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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE DIFRANCESCO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-45a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 46a-47a) was entered on August 6, 1979. On

August 28, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 5, 1979 (App. C, *infra*, 48a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of 18 U.S.C. 3576 that permits the United States to seek appellate review of a sentence imposed by a district court under 18 U.S.C. 3575 violates the Double Jeopardy Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 3575(b) provides in pertinent part:

> Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. * * * If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court

shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

3. 18 U.S.C. 3576 provides:

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the

defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the

United States may be dismissed on a showing of abuse of the right of the United States to take such review.

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, respondent was convicted of conducting the affairs of an enterprise through a pattern of racketeering activities and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(c) and (d). Following a second jury trial in the same district, respondent was convicted of damaging federal property, in violation of 18 U.S.C. 1361, unlawfully storing explosive materials, in violation of 18 U.S.C. 842(j), and conspiring to commit these offenses, in violation of 18 U.S.C. 371. He was first sentenced to a total of nine years' imprisonment on the convictions arising from the second trial and was then sentenced to two ten-year terms of imprisonment on the racketeering counts, to be served concurrently with each other and with the sentence imposed after the second trial.[1] Respondent appealed from both convictions, and the government appealed under 18 U.S.C. 3576 from the sentence at the racketeering trial. The court of ap-

[1] The court sentenced respondent to concurrent terms of eight years' imprisonment on the bombing charge and five years' imprisonment on the conspiracy charge, to be followed by a one-year term of imprisonment on the charge of unlawful storage of dynamite (C.A. Resp. App. 9). ("C.A. Resp. App." refers to the appendix filed by the respondent in the court of appeals.)

peals affirmed the convictions and dismissed the government's appeal (App. A, *infra*, 1a-45a).

Prior to respondent's first trial, the government filed a notice with the district court, pursuant to 18 U.S.C. 3575(a), alleging that respondent was a "dangerous special offender," as defined in 18 U.S.C. 3575(e)(3) and (f). The notice indicated the government's intention to seek imposition of an enhanced sentence under 18 U.S.C. 3575(b) in the event respondent was convicted (App. A, *infra*, 20a). On October 31, 1977, respondent was found guilty on the racketeering charges. The proof at trial showed that he had operated an "arson for hire" ring, the activities of which included multiple acts of arson and the use of the mails to defraud insurance companies of approximately $480,000 (*id.* at 3a).

Between the time of respondent's trial on the racketeering charges and the commencement of the special sentencing hearing required by 18 U.S.C. 3575(b), respondent was tried and convicted in the second proceeding against him. In that case, the evidence showed that he had bombed the Federal Building in Rochester, New York, with dynamite that he had unlawfully stored (App. A, *infra*, 2a, 16a n.9).

Subsequently, on March 17, 1978, the special sentencing hearing was held, and on April 21, 1978, the district court ruled that respondent was a dangerous special offender.[2] Nevertheless, on April 28, 1978,

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[2] Among its findings of fact, the court found that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most

the court sentenced respondent to concurrent terms of 10 years' imprisonment on the racketeering charges, to be served concurrently with the nine-year sentence that had already been imposed on March 17, 1978, in connection with his second trial (App. A, *infra*, 21a).

Under the authority granted by 18 U.S.C. 3576, the government appealed from the dangerous special offender sentence, claiming that the district court abused its discretion in imposing a sentence that would lead, in effect, to additional imprisonment for only one year despite the court's findings after the dangerous special offender hearing (App. A, *infra*, 21a-22a; see note 2, *supra*). The court of appeals dismissed this appeal on the ground that 18 U.S.C. 3576 violates the Double Jeopardy Clause. The court held that the constitutionality of the statute was a threshold jurisdictional issue that had to be faced before the merits of the government's appeal could be reached (App. A, *infra*, 23a).[3] Finding that it

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violent and dangerous nature against the lives and property of the citizens of this community. It further shows the [respondent's] complete and utter disregard for the public safety. The [respondent], by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal conduct by the [respondent]" (C.A. Pet. App. A. 59). ("C.A. Pet. App." refers to the appendix filed by petitioner in the court of appeals.)

[3] The concurring opinion of Judge Haight suggests that the government's appeal should have been dismissed because 18 U.S.C. 3575 and 3576 were inapplicable to respondent (App. A, *infra*, 44a-45a). The majority of the court disagreed,

was "obliged to construe strictly the procedure that Congress has authorized" (App. A, *infra*, 28a), the court noted that the sentence imposed by the district court was final rather than "tentative." [4] Relying primarily on *Kepner* v. *United States*, 195 U.S. 100 (1904) (App. A, *infra*, 29a-30a) and a number of statements in dicta by this Court and the courts of appeals (*id.* at 33a-36a), the court concluded that "the double jeopardy clause bars an increase in the sentence imposed by the district court" (*id.* at 36a) and accordingly that the government could not challenge a final sentence on appeal.

REASONS FOR GRANTING THE PETITION

1. In dismissing the government's appeal, the court of appeals has declared unconstitutional on its

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finding that Section 3575 could properly have been applied to respondent (App. A, *infra*, 23a-24a n.13). In any event, that issue is not presented here. The court of appeals held that it lacked jurisdiction to entertain the government's appeal because of the unconstitutionality of Section 3576. Until jurisdiction is established, a court cannot consider the merits of the issues presented to it for resolution. See *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951).

[4] The legislative history indicates that Congress clearly intended that the sentence would not be final until the appeal had been exhausted. The original bill introduced in the Senate explicitly provided that the district court sentence was "not final." S.30, 91st Cong., 1st Sess., § 3577 (1969). *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong., 1st Sess. 28-29 (1969). It was felt, however, that such a label was superfluous and it was omitted from the statute. S. Rep. No. 91-617, 91st Cong., 1st Sess. 98 (1969).

face an Act of Congress that was carefully drafted with constitutional considerations in mind. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 93-98 (1969). The appellate review of sentence provision in 18 U.S.C. 3576 is part of the Dangerous Special Offender Sentencing Statutes, 18 U.S.C. 3575-3578, which were enacted as Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 948. Section 3576 was, in part, a response to the recommendation of the President's Commission on Law Enforcement and Administration of Justice that "[t]here must be some kind of supervision over those trial judges who * * * tend to mete out light sentences in cases involving organized crime management personnel." Report of the President's Commission on Law Enforcement and the Administration of Justice: *The Challenge of Crime in a Free Society* 203 (1967). The court of appeals' decision has nullified a carefully considered legislative effort at such supervision.

Moreover, the court's decision has implications that reach far beyond the specific context of Section 3576. First, the ruling almost certainly invalidates the quite similar statute permitting the government to seek appellate review of sentences of special drug offenders, 21 U.S.C. 849(h). Perhaps more important, it also would appear to cast substantial doubt on the validity of a key section of the revised criminal code that is now pending in Congress. This section permits appellate review, at the government's behest,

of sentences that are not within specified guidelines.[5] The purpose of the provision is to reduce unwarranted disparities in sentencing and to promote equal treatment of similarly situated offenders. See the National Commission on Reform of Federal Criminal Laws, *Final Report* 317 (1971). If disparities in sentencing cannot be eliminated by other means, legislatures may be induced to limit the sentencing flexibility of trial judges, contrary to the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). See *United States* v. *Grayson*, 438 U.S. 41, 45-49 (1978). The

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[5] S. 1722, 96th Cong., 1st Sess. § 3725(b) (1979) provides:

> (b) APPEAL BY THE GOVERNMENT.—The government may, with the approval of the Attorney General or his designee, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the minimum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—
>
> (1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedures; or
>
> (2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

Double Jeopardy Clause need not be read to discourage these sentencing reforms.

2. The statutory scheme of 18 U.S.C. 3575 and 3576 does not offend any of the policies and protections that have historically been embodied in the Double Jeopardy Clause. The Court has noted that the Fifth Amendment guarantee against double jeopardy consists of three separate protections—against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *United States* v. *Wilson*, 420 U.S. 332, 343 (1975), quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). None of these protections is threatened by the government appeal of a sentence.

It is well-established that "the primary purpose of the Double Jeopardy Clause was to prevent successive trials, and not Government appeals *per se*." *Sanabria* v. *United States*, 437 U.S. 54, 63 (1978). See also *United States* v. *Wilson*, *supra*. This is because enduring "the hazards of trial and possible conviction more than once for an alleged offense" subjects a defendant to "embarrassment, expense and ordeal" and increases the risk that an innocent person will be found guilty. *Green* v. *United States*, 355 U.S. 184, 187 (1957). More generally, as the court of appeals noted (App. A, *infra*, 31a-32a), the purpose of the prohibition is to prevent "[g]overnment oppression" of criminal defendants. *United States* v. *Scott*, 437 U.S. 82, 99 (1978). It "serves principally as a restraint on

courts and prosecutors" once the legislature has enacted a scheme of punishment. *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). 18 U.S.C. 3576, a legislative attempt to supervise sentencing, subjects a defendant to no further proceedings other than an appellate hearing [6] and cannot be characterized as "government oppression."

Nor is the bar against multiple punishment implicated in this case. If on review under Section 3576 a defendant is sentenced by the court of appeals to a term of imprisonment greater than that originally imposed by the district court, he is receiving a single punishment for his offense pursuant to a legislatively prescribed procedure. The prohibition against multiple punishment can be defined only by reference to the punishment authorized by the legislature. Thus, in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), the Court held that the Double Jeopardy Clause was violated because, after the defendant had already paid a fine, he was sentenced to imprisonment for a crime whose statutory penalty was a fine *or* imprisonment. See also *In re Bradley*, 318 U.S. 50, 52 (1943). The Double Jeopardy Clause assures only "that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, *supra*, 432 U.S. at 165.

Indeed, this Court has recently ruled that a legislatively authorized two-stage trial and sentencing

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[6] The hearing is "on the record of the sentencing court" and thus does not permit the prosecution a "second crack" at supplying evidence. See *Swisher* v. *Brady*, 438 U.S. 204, 215-216 (1978); *Burks* v. *United States*, 437 U.S. 1, 11 (1978).

scheme analogous to Section 3576 does not violate the Double Jeopardy Clause. In *Swisher* v. *Brady*, 438 U.S. 204 (1978), the Court upheld a Maryland procedure under which a master may hear juvenile cases. The master submits findings, a recommended sentence and a proposed order to the judge, who may adopt them without further proceedings. Either the juvenile or the state may file exceptions to the master's findings, however, in which case the judge holds a hearing on the record on the exceptions and may reach a finding on guilt or impose a sentence different than that recommended by the master. The Court rejected the contention that this potential for conviction or sentence increase following a government appeal violates the Double Jeopardy Clause.[7] Rather, the Court held that the legislature has established a system "in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215. Similarly, the dangerous special offender statutes set up a system whereby the sentence imposed by the district court is not final until the appellate procedures provided in Section 3576 are either exhausted or not invoked within the restrictive time limits provided.[8]

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[7] See also *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), and *Colten* v. *Kentucky*, 407 U.S. 104 (1972) (imposition of a higher sentence at the second trial in a two-tier court system does not violate the Double Jeopardy Clause).

[8] Because, under 18 U.S.C. 3575 and 3576, the defendant is on notice from the outset that his sentence is subject to appellate review at the insistence of the government, the re-

3. In concluding that 18 U.S.C. 3576 is unconstitutional, the court of appeals relied primarily on *Kepner* v. *United States*, 195 U.S. 100 (1904).[9] In *Kepner*, the Court held that the Double Jeopardy Clause prohibited the government from appealing a judgment of acquittal. The court of appeals reasoned that a convicted defendant whose sentence is appealed by the government is no less placed in double jeopardy than one whose acquittal is appealed, because in either case the government "seeks a more favorable result in another tribunal" (App. A, *infra*, 30a). This simple equation of the finality of a sentence with that of an acquittal is at odds with the decisions of this Court.

In *Bozza* v. *United States*, 330 U.S. 160 (1947), for example, the district court imposed a sentence below the mandatory minimum required by statute.

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view procedure causes none of the emotional distress often associated with a second trial following a mistrial granted over the defendant's objection. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. 28, 38 (1978).

[9] The court of appeals also cited several statements by this Court in support of its position, although it acknowledged that they were dicta (App. A, *infra*, 33a-35a). In *United States* v. *Benz*, 282 U.S. 304 (1931), the Court held that a district court had the power to *reduce* a defendant's sentence. The Court's comments concerning an increase in sentence explicitly relied on *Ex parte Lange*, *supra*, and referred to the imposition of a second punishment for the same offense. 282 U.S. at 307-308. In *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900), the court *upheld* the imposition of a longer sentence where the first sentence was vacated. The court of appeals also cited to a footnote in the plurality opinion in *Reid* v. *Covert*, 354 U.S. 1, 37 n.68 (1957), a case where the Double Jeopardy Clause was not in issue.

Thereafter, the court recalled the defendant, explained its mistake, and imposed a more severe sentence as required by the mandatory statutory provision. This Court held that this increase in sentence "did not twice put [defendant] in jeopardy for the same offense," because it had no authority to impose the first sentence. 330 U.S. at 167. By contrast, in *Fong Foo* v. *United States*, 369 U.S. 141 (1962), the Court held that the Double Jeopardy Clause barred appellate review of the district court's acquittal of the defendants in the middle of the prosecution's case—an action that the district court similarly lacked authority to take. In addition, the Court has held that when a defendant is retried after having his conviction set aside, he may be sentenced to a longer term of imprisonment than he receives at his first trial. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721. However, if at his first trial a defendant is charged with first degree murder but is convicted only of second degree murder, he cannot be charged again with first degree murder at a retrial following a reversal of his conviction on appeal. *Green* v. *United States*, *supra*. Thus, in two different contexts, the Court has indicated that there is a material difference for double jeopardy purposes between the fact-finding and sentencing processes and that, for the purpose of the finality required by the Double Jeopardy Clause, a retrial following acquittal is regarded differently from the imposition of a higher sentence at a second proceeding.

By the same token, there is no merit to the court of appeals' suggestion (App. A, *infra*, 38a n.25) that the government may not appeal a sentence because a defendant is entitled to protect the integrity of a final judgment in the trial court unless he takes some action to challenge it. In *United States* v. *Wilson*, 420 U.S. 332 (1975), the district court dismissed the indictment after the defendant had been found guilty by a jury. Although the defendant's trial had been completed, the Court held that he had no vested right to the resolution in his favor because a reversal on appeal would not have required a second trial, and hence the government was permitted to appeal the dismissal. *Id.* at 344.

In fact, as noted above, this Court has squarely held that the imposition of a greater sentence at a second proceeding, in the context of a retrial following the reversal of a conviction, does not violate the Double Jeopardy Clause. *North Carolina* v. *Pearce*, *supra*. The only difference between that case and the situation involved here is whether the second proceeding comes about because the defendant appeals his conviction or because the government appeals the sentence. There is no reason why this difference should affect the applicability of the Double Jeopardy Clause.

The court of appeals' attempts to distinguish *Pearce* are unconvincing. The court suggested initially that *Pearce* rests partly on the theory that society cannot permit a defendant to be granted immunity simply because a reversible error occurred at his first

trial (App. A, *infra*, 36a-38a). As the court itself conceded (*id.* at 37a), however, this reason cannot explain the result in *Pearce* because restriction of the sentence imposed on retrial to that imposed at the first trial would not confer any immunity on the defendant. The court therefore concluded that the critical factor in *Pearce* was that the second proceeding was a consequence of the defendant's "voluntary choice" (*id.* at 37a-38a).

The court of appeals' conclusion that the Double Jeopardy Clause protects a defendant against the later imposition of a greater sentence than that imposed at trial, but that that protection is lost if the defendant makes a "voluntary choice" and appeals his conviction, is untenable. A defendant's challenge to the validity of his indictment or the fairness of his trial certainly does not signal a willingness to place the length of his sentence in issue. Moreover, the reasoning of the court below has been expressly repudiated by this Court. In *Green* v. *United States*, *supra*, the Court rejected the notion that the defendant's appeal of his conviction waived his constitutional protection against retrial on a count on which the jury had refused to find him guilty. The Court stated that "[w]hen a man has been convicted * * * it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy * * * in order to secure a reversal of an erroneous conviction * * *. In short, he has no meaningful choice." 355 U.S. at 191-192. As in *Green*, the defendant in *Pearce* had no meaningful choice other

than to appeal his conviction.[10] Thus, *Pearce* cannot be explained by invoking the defendant's decision to appeal; rather, that case simply holds that the Double Jeopardy Clause does not preclude an increase of sentence at a second proceeding that is contemplated by the legislature. Cf. *Burks* v. *United States*, 437 U.S. 1, 17-18 (1978).[11]

In sum, an Act of Congress that attempts to establish some supervision over sentencing in a manner that is neither oppressive nor vindictive has been invalidated based upon an erroneous interpretation of the Double Jeopardy Clause. This decision, which may have serious adverse effects on ongoing sentencing reform efforts, merits this Court's review.

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[10] *United States* v. *Scott*, *supra*, where the defendant made a strategic decision to terminate the trial before its completion, deals with a completely different situation than *Pearce*. In *Scott*, the defendant could have chosen to make his motion after the completion of the trial, thus avoiding the necessity for a retrial. 437 U.S. at 98-101.

[11] Of course, as *Pearce* explains (395 U.S. at 723-725), other constitutional provisions, such as the Due Process Clause, may protect a defendant against arbitrary or irrational sentence increases. In addition, 18 U.S.C. 3576 itself provides that a government appeal of sentence "may be dismissed on a showing of abuse of the right of the United States to take such review."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 231, 908, 1094—August Term, 1978

(Argued April 20, 1979 Decided August 6, 1979)

Docket Nos. 78-1250, 78-1369, 78-1371

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

—*v.*—

EUGENE DI FRANCESCO, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

—*v.*—

EUGENE DI FRANCESCO, DEFENDANT-APPELLANT

Before:

SMITH and MESKILL, *Circuit Judges*, and
HAIGHT,* *District Judge*

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* Honorable Charles S. Haight, Jr., United States District Judge for the Southern District of New York, sitting by designation.

SMITH, *Circuit Judge*:

These are appeals by a defendant from judgments of conviction entered after two separate jury trials in the United States District Court for the Western District of New York, and by the government from a sentence imposed under the "dangerous special offender" provisions of 18 U.S.C. § 3575. In the first trial, Harold P. Burke, *Judge*, presiding, the appellant, Eugene DiFrancesco, was convicted of conspiring to participate in and conduct the affairs of an enterprise through a pattern of racketeering activity, which included multiple acts of arson and use of the mails to defraud insurance companies, in violation of 18 U.S.C. § 1962(c) and (d). In the second trial, George C. Pratt, *Judge*, presiding by designation, DiFrancesco was convicted on three counts which alleged that he willfully caused damage in excess of $100 to federal property, 18 U.S.C. § 1361, unlawfully stored explosive materials, 18 U.S.C. § 842(j), and conspired to commit these acts, 18 U.S.C. § 371. We affirm the convictions and dismiss the government's appeal.

On July 24, 1975, DiFrancesco, together with seven co-defendants, was indicted on charges arising out of a series of bombings that occurred in the Rochester area on Columbus Day in 1970. A second indictment, filed on April 7, 1976, named DiFrancesco and seven others, two of whom were also defendants in the bombing indictment, as defendants in two counts of racketeering involving an "arson-for-hire" ring operating in the Rochester area. Since this second indict-

ment was the first to come to trial, we shall begin by discussing DiFrancesco's appeal from the resulting conviction on the racketeering charges.

RACKETEERING

DiFrancesco and five of the seven co-defendants in the racketeering indictment were tried jointly, in September and October of 1977. Of the two remaining defendants, Joseph LaNovara pleaded guilty before trial and testified as a witness for the government, while Frank Valenti, the alleged leader of the conspiracy, was severed upon the government's motion because he was ill.

The government presented evidence by which it sought to prove that an arson-for-hire team, which operated as part of a larger organization engaged in illicit activities in the Rochester area, had been responsible for at least eight fires that occurred there between 1970 and 1973. The arson ring allegedly agreed with the property owners to destroy their buildings in return for a share of the insurance proceeds. The government charged that insurance companies had been defrauded of about $480,000 as a result of the eight fires. The jury acquitted four of the six defendants, but convicted DiFrancesco and Vincent Rallo on both counts. DiFrancesco's appeal alleges several errors in the district court.

The most substantial issue raised by DiFrancesco is whether certain statements made by government witnesses to the FBI should have been turned over to

the defendants under the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Shortly before this trial began, it was disclosed that allegations of wrongdoing had been lodged against some members of the Monroe County Sheriff's Office. These allegations arose in connection with the Sheriff's Office's investigation of a number of crimes in which the defendants in this case allegedly had been involved, including a murder for which DiFrancesco had been convicted in state court. The FBI, as part of a federal civil rights investigation of the Sheriff's Office's activities, conducted a number of interviews and compiled interview reports.[1] The subject matter of some of these interviews included alleged instances of perjury by witnesses in state court proceedings. Some of these witnesses were expected to be called by the United States to testify in the case against DiFrancesco and his co-defendants.

When this matter arose, Judge Burke granted a continuance for one week during which the government represented that it would seek to learn more about the allegations and would then "turn over all materials that is [sic] favorable to the defense that result from the investigation." The government reviewed approximately thirty to thirty-five FBI reports and determined that only one was *Brady* material. The government then submitted the reports

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[1] This investigation resulted in the filing of an indictment in the Western District on April 12, 1979 against five members of the Monroe County Sheriff's Office. *United States* v. *Kennerson*, Cr. 79-65.

to the trial judge to allow him to decide whether he thought any of the remaining material fell within *Brady*. The judge picked out about fifteen other reports which he ruled were *Brady* material, but the government refused to turn over these additional reports to the defendants. It argued that exposure of the reports could endanger the ongoing civil rights investigation. Thus, the government stated that it was "willing to stand or fall on that decision [that the reports were not *Brady* material] made by itself." The court denied a motion that it order the government to turn over the reports. Instead, those reports which the court believed were *Brady* material were sealed as Court Exhibit A, and those which the court and government agreed were not within *Brady* were sealed as Court Exhibit B. At some later time, the government gave defense counsel the reports of interviews of LaNovara and of Angelo Monachino, an unindicted co-conspirator, who was to testify for the government. Both of these reports were part of Court Exhibit A, as was a third report which the government eventually turned over as Jencks Act material.

Our examination of the court exhibits convinces us that the reports included no *Brady* material. None of the reports exculpated DiFrancesco, nor did any demonstrate that the government's case included perjured testimony. Furthermore, nothing in the reports that the government refused to turn over constitued "material evidence that would impeach a Government witness whose 'reliability . . . may well [have been]

determinative of guilt or innocence.'" *Ostrer* v. *United States*, 577 F.2d 782, 785 (2d Cir. 1978), *cert. denied*, 99 S.Ct. 1018, 47 U.S.L.W. 3482 (January 15, 1979), *quoting Giglio* v. *United States*, 405 U.S. 150, 154 (1972), *quoting Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). One report (Part A of Court Exhibit A) contains two comments attributed to Monachino. Neither of these comments, however, could have been used to impeach Monachino in any way that might have affected the outcome of the trial, which is the standard by which we measure the materiality of undisclosed information for which the defendant makes a specific request. *United States* v. *Agurs*, 427 U.S. 97, 104-06 (1976). *Ostrer*, *supra*, 577 F.2d at 786. In short, the FBI reports would have added nothing to the vigorous attacks which DiFrancesco and his co-defendants made upon the credibility of a number of the government's witnesses through use of the substantial public information relating to the investigation.

DiFrancesco also raised several arguments involving evidentiary questions and portions of the court's instructions to the jury. The first concerns the introduction into evidence of a state court indictment that charged DiFrancesco and others with an act of arson, a fire at Select Tire Company, that also constituted part of a specific act of racketeering alleged in the federal indictment. The government offered the indictment and had a portion of it read to the jury as part of its rebuttal case, for the stated purpose of making the jury aware of the final disposi-

tion of the state court case against one of the persons named in the state indictment.

It is difficult to perceive how the indictment was relevant for the purpose stated by the government. In fact, its relevance and materiality to any issue in the case was, at best, minimal. Counsel for the various defendants, including DiFrancesco, opened up the subject of the state court proceedings in their cross-examination of government witnesses. Introduction of the indictment, however, was not, as the government now contends, necessary to clarify the "meaning" of the outcome of the state trial.[2] But admission of the indictment, even if erroneous, did not prejudice DiFrancesco. The jury already knew, from the defendants' cross-examination of government witnesses, that the state grand jury had received testimony implicating DiFrancesco in the Select Tire fire, that some persons had been tried in state court in connection withthat fire, that testimony alleging DiFrancesco's participation had been offered at the state court trial, and that DiFrancesco had been named as a co-conspirator in yet another federal indictment alleging mail fraud arising from a separate act of arson. Under these circumstances, admission of the indictment, even if erroneous, was harmless.

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[2] Only two of the defendants named in the state court indictment had been tried. The jury acquitted Joseph Nalore, one of DiFrancesco's co-defendants in this case, but was unable to agree on a verdict as to Lawrence Uchie. Uchie then entered an "*Alford* plea" of guilty, see *North Carolina* v. *Alford*, 400 U.S. 25 (1970), to the state charges, while at the same time maintaining his innocence.

DiFrancesco also disputes the admissibility of certain testimony by LaNovara and Monachino, who described the initiation ritual[3] followed by the organization of which the arson-for-hire ring was a part. Admission of this testimony was not erroneous. The evidence was probative of the existence of an "enterprise," the affairs of which were conducted through a pattern of racketeering activity, which was a matter on which the court correctly charged that the government had the burden of proof. The evidence was sufficiently probative to outweigh any possible prejudice.

DiFrancesco next contends that the testimony that LaNovara and Monachino were participants in the Federal Witness Protection Program, as authorized by the Organized Crime Control Act of 1970, P.L. No. 91-452, Title V, 84 Stat. 933, should not have been allowed. Since a defendant often will seek to impeach a participating witness by showing that he has received significant benefits while in the program, the government may desire to bring out the witness' participation during direct examination in order to avoid an inference that the government was attempting to hide the witness' possible bias. Although disclosure of such participation "must be handled delicately," *United States* v. *Partin*, 552 F.2d 621, 644-45 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977), so

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[3] The ritual, which included the recitation of an oath of loyalty to the organization, consisted of pricking one's trigger finger, absorbing the blood in a tissue and holding the tissue in one's hand while it burned.

as to minimize the possibility that the jury will infer that the defendant was the source of danger to the witness, such testimony is permissible so long as the prosecutor does not attempt to exploit it. No exploitation occurred here, and the defendants cross-examined the witnesses at length to develop the full extent of the benefits received by them. Thus there was no error in allowing the testimony. Nor was the court's instruction to the jury on this subject erroneous or insufficient.[4] The instruction did not suggest, as DiFrancesco argues, that the Attorney General was vouching for the credibility of the witnesses. Instead, it simply explained the purpose of the program and dispelled any implication that the benefits received

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[4] The court instructed the jury:

> You have heard numerous references during the course of this trial to the Federal Witness Protection Program. Federal law provides that the Attorney General of the United States is authorized to provide for the security of government witnesses, potential government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in any organized crime activity.
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> Federal law also provides that the Attorney General of the United States is authorized to provide for the health, safety and welfare of witnesses and persons intended to be called as government witnesses and the families of witnesses and persons intended to be called as government witnesses in legal proceedings instituted against any person alleged to have participated in an organized crime activity whenever in his judgment testimony from, or a willingness to testify by such a witness would place his life or person or the life or person of a member of his family or household in jeopardy.

by LaNovara and Monachino were bestowed improperly. No additional instruction was necessary. *Id.*

Lastly, DiFrancesco argues that the court removed an element of the crime from the jury's consideration by instructing that, if the jury believed the evidence that about $480,000 in claims was paid by insurance companies in New York and other states as a result of the arsons and mail fraud, then the enterprise did affect interstate commerce as required by 18 U.S.C. § 1962(c). This instruction was proper. The court left to the jury the question of fact, whether the claims had been paid as a result of arson engaged in by the defendants. The trial judge correctly determined, however, that if the defendants' alleged actions were proven, the effect of those actions on interstate commerce was a question of law. *Cf. United States* v. *Ricciardi*, 357 F.2d 91, 94 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966) (whether activities constitute an "industry affecting commerce" under 29 U.S.C. § 186 is a question of law); *United States* v. *Varlack*, 225 F.2d 665, 670-72 (2d Cir. 1955) (judge instructed that, if jury believed testimony of government witnesses, defendant's acts affected commerce as defined in Hobbs Act, 18 U.S.C. § 1951).

THE COLUMBUS DAY BOMBINGS

DiFrancesco's attack on his conviction arising from the bombing and explosives charges focuses on the delay between his indictment and the commencement of trial. He contends that the indictment should have been dismissed because this delay violated the Speedy

Trial Act, 18 U.S.C. §§ 3161-74 ("the Act"), the Western District's Transitional Plan for Achieving the Prompt Disposition of Criminal Cases ("the Plan"), and the sixth amendment's guarantee of a speedy trial.

DiFrancesco was indicted on July 24, 1975 and arraigned on September 8, 1975. The relevant provisions of the Act, 18 U.S.C. §§ 3161(g) and 3163(b)(2), and of the Plan, § 5(a)(1), did not take effect until July 1, 1976. They require that trial of a defendant arraigned before the effective date shall commence within 180 days of that date. Both the Act and the Plan (§ 10(a)) provide, however, for the exclusion of certain periods of delay set forth in 18 U.S.C. § 3161(h) in computing the 180-day period. DiFrancesco contends that the non-excludable delay in this case amounted to 309 days. The government, which conceded in the district court that the 180-day period had expired, now argues that the non-excludable delay totaled either 283, 273, 177 or 145 days, or perhaps no time at all. We need not choose, however, from among these various calculations, because 18 U.S.C. § 3163(c) delays the effective date of the sanctions provided in § 3162 for violations of the Act until July 1, 1979, *United States* v. *New Buffalo Amusement Corp.*, No. 78-1317, slip op. 2745 at 2757-58 (2d Cir. May 22, 1979); *United States* v. *Carini*, 562 F.2d 144, 148 (2d Cir. 1977), and § 11(e) of the Plan provides that failure to comply with its provisions shall not require dismissal. *New Buffalo Amusement Corp.*, *supra*, slip op. at 2757 n. 13.

Although the district court retains discretionary power under Rule 48(b) of the Federal Rules of Criminal Procedure to dismiss an indictment because of excessive delay, *United States* v. *Lane*, 561 F.2d 1075, 1078 (2d Cir. 1977), DiFrancesco did not invoke that discretion and thus cannot complain of the court's failure to exercise it. *New Buffalo Amusement Corp.*, *supra*, slip op. at 2757 n. 13.

We turn therefore to DiFrancesco's claim that the pretrial delay violated his sixth amendment right to a speedy trial. We shall assume for this purpose that the delay exceeded that allowed under the Act and the Plan, since such a violation may be considered in assessing the merit of a constitutional speedy trial claim. *Id.* at 2758; *Carini*, *supra*, 562 F.2d at 148, 151-52. Nonetheless, we agree with the district judge's thorough and well-reasoned opinion in which he concluded that DiFrancesco's claim lacks merit. *United States* v. *DiFrancesco*, Cr. 75-165 (W.D.N.Y. April 3, 1978).

The controlling authority is of course *Barker* v. *Wingo*, 407 U.S. 514 (1972), in which the Court enunciated four factors to be considered in evaluating a claim of a denial of the right to a speedy trial. These factors are (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the existence of prejudice to the defendant from the delay. *Id.* at 530. Other relevant circumstances also may be considered in conducting a "difficult and sensitive balancing process,"

id. at 533, "in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530.

The delay between indictment and trial in this case was about 30 months. The government concedes that this is sufficient to "trigger" a further investigation of the other factors. *See id.* at 530-31; *Carini*, *supra*, 562 F.2d at 148-49. The reasons for the delay were numerous, including trials of DiFrancesco on state charges and the federal racketeering charges, illness of his attorney and of Judge Burke, to whom the case originally was assigned, the participation of DiFrancesco's attorney in a trial on behalf of another client (during which time Judge Burke denied the government's request to remove the attorney from this case), and the pendency of motions by the defendants and the government. Although the government bears the responsibility for some of the delay, including that caused by "institutional factors" such as overcrowding of the district court's docket, *Barker* v. *Wingo*, *supra*, 407 U.S. at 531, there is no suggestion in the record of any deliberate attempt [by the government] to delay the trial in order to hamper the defense," *id.*, and it is apparent that DiFrancesco was responsible for a substantial portion of the delay. Moreover, the government repeatedly moved to set a trial date, a fact which distinguishes this case from *United States* v. *Vispi*, 545 F.2d 328, 334 (2d Cir. 1976). DiFrancesco, on the other hand, did not assert his speedy trial claim until the eve of trial.[5]

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[5] Two of DiFrancesco's co-defendants, but not DiFrancesco himself, moved for dismissal of the indictment in March 1977,

The final factor, prejudice to the defendant, also fails to support DiFrancesco's claim. He argues that the death of a potential witness, Samuel DiGaetano, caused substantial prejudice which can be attributed to the delay. DiGaetano, attorney for severed co-defendant Frank Valenti, allegedly would have testified, in direct contradiction of a government witness, that Valenti was in Pittsburgh on the day of and the day immediately preceding the bombings.[6]

We find no error in the district court's conclusion that the evidence presented to it failed to support the contention that DiGaetano would have given such testimony. Moreover, although DiGaetano's death apparently was caused by a heart condition from which he had suffered for a substantial period of time, DiFrancesco made no effort to preserve by deposition the testimony that purportedly would have been given. In addition, as the district court noted, DiFrancesco's motion and supporting materials contained no affidavit from Valenti concerning his whereabouts on October 11 and 12. Although Valenti was too ill to undergo trial at the same time as his co-defendants, there is no indication that his illness prevented him from asserting, by affidavit or any other

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alleging a violation of the Speedy Trial Act. These motions of course do not evidence any assertion by DiFrancesco of *his* right to a speedy trial.

[6] The government contended at trial that Valenti arranged and conducted a meeting in Rochester on October 11, 1979, at which the bombings were planned, and that he also took part in the bombings.

means, his presence in Pittsburgh on the days in question.[7]

Even if we assume then that the Plan and Act were violated and weigh such violation in our analysis of DiFrancesco's claim, the balance tips strongly against his contention that his right to a speedy trial was violated.

DiFrancesco next argues that the court should have severed or declared a mistrial as to Count II of the indictment because of an error that was not discovered until the conclusion of the presentation of the government's case. At that time it was learned that the language contained in Count II of the copies of the indictment possessed by counsel for both the government and the defendants differed from that in the copy filed with the court. The prosecutor mistakenly had distributed copies of an earlier draft of the indictment, rather than the final, filed version. The earlier draft, which all counsel had assumed to be the actual indictment, named Valenti as the person who caused the damage to the old Federal Building and named the other defendants, including Di-

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[7] The absence of evidence to support the claim of prejudice perhaps is explained by Valenti's subsequent plea of guilty, entered on February 15, 1979 before Judge Curtin, to one count of the indictment in this case. Valenti entered his plea after the attorney for the Department of Justice had recited a summary of the testimony which the government would have offered if the case against Valenti had gone to trial. This included testimony placing Valenti in Rochester on October 11 and 12. Valenti offered no objection or comment in response to this summary.

Francesco, as aiders and abettors.[8] The actual indictment named all the defendants as principals and, in addition, merely cited 18 U.S.C. § 2, the aiding and abetting statute.[9]

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[8] Count II of the draft of the indictment charged:

> THAT, on or about October 11 and 12, 1970, in the Western District of New York, the Defendant herein, FRANK J. VALENTI, unlawfully did wilfully cause the wilful injury to and commission of depredations against the property of the United States of America and the departments and agencies thereof—namely the premises known as the (old) Federal Building located at Church and Fitzhugh Streets in the City of Rochester, New York —the damages to the said premises having exceeded the sum of $100:
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> AND, at the time and place aforesaid, RENE J. PICCARRETO, SALVATORE GINGELLO, THOMAS DIDIO, DOMINIC CELESTINO, EUGENE DI FRANCESCO, ANGELO VACCARA and ANTHONY GINGELLO, the Defendants herein, unlawfully did aid, abet, counsel, command, induce and procure the commission of the aforesaid offense, all of which was in violation of the provisions of Section 1361 and 2 of Title 18 of the United States Code.

[9] Count II of the filed indictment charged:

> THAT, on or about October 11 and 12, 1970, in the Western District of New York, the Defendants herein, FRANK J. VALENTI, RENE J. PICCARRETO, SALVATORE GINGELLO, THOMAS DIDIO, DOMINIC CELESTINO, EUGENE DI FRANCESCO, ANGELO VACCARO and ANTHONY GINGELLO unlawfully and wilfully did injure and cause injury to and the commission of depredations against the property of the United States of America and the departments and agencies thereof—namely, the premises known as the (old) Federal Building located at Church and Fitzhugh Streets in the City of Rochester, New York—the damages to the

DiFrancesco complains that as a result of this confusion, for which he bore no fault, he was convicted under a theory at substantial variance from that which he had a right to believe was the basis of the case. He argues that the assumed indictment was more narrowly drawn than the actual, and that therefore, the substitution of the actual version was forbidden by *Stirone* v. *United States*, 361 U.S. 212 (1960), which holds that a broadening of the charges may only be accomplished by the grand jury itself.

The decision in *Stirone*, however, is not relevant to the circumstances presented here. The Court relied in *Stirone* on the violation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id.* at 217. There is no question that the count on which DiFrancesco ultimately was tried and convicted actually was returned by the grand jury, thus protecting his right to have his jeopardy limited to "offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Id.* at 218. DiFrancesco's real claim is that he was not afforded notice of the charge on which he was convicted. As the Supreme Court explained in *Berger* v. *United States*, 295 U.S. 78, 82 (1935), one of the reasons "that allegations and proof must correspond is . . . the obvious [requirement] that the accused shall be definitely informed as to the charges against

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said premises having exceeded the sum of $100, all of which was in violation of the provisions of Sections 1361 and 2 of Title 18 of the United States Code.

him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial. . . ." The protection of this right to notice of the charges requires a determination "whether there has been such a variance as to 'affect the substantial rights' of the accused." *Id.; United States* v. *Knuckles*, 581 F.2d F.2d 305, 311 (2d Cir.), *cert. denied*, 99 S.Ct. 581, 47 U.S.L.W. 3369 (November 27, 1978); *see United States* v. *Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977).

No such prejudicial variance occurred here. Although the assumed indictment was drawn somewhat more narrowly than was the actual indictment, the evidence introduced and the theory of culpability advanced by the government were not affected by the difference. The government offered no evidence as to who actually delivered the bomb to the Federal Building. Its evidence supported the narrower charge that Valenti "caused" the damage to the building because he directed the conspiracy. Finally, the government withdrew the aiding and abetting theory and proceeded on the "*Pinkerton*" [10] theory that each defendant was responsible for the substantive acts of his co-conspirators carried out in furtherance of the conspiracy. This theory would have been permissible under either version of Count II.

DiFrancesco's claim of prejudice is unsubstantiated. He contends that, had he known the actual wording of the indictment, he would have conducted additional cross-examination of Monachino and would not

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[10] *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946).

have entered into certain stipulations. This contention is undermined, however, by counsel's failure to ask the trial court to recall Monachino for further cross-examination and his failure to withdraw any of the stipulations, which had not yet been given to the jury. Since the difference in the two versions of the indictment caused no prejudice to any substantial rights of the accused, the district court did not err in denying severance or a mistrial.

DiFrancesco's final argument involves Count VI, which accused him of unlawfully storing explosives. He contends that this count should have been dismissed because there was no proof presented that the storage continued after Febraury 12, 1971, the effective date of 18 U.S.C. § 842(j), which he was charged with violating. We disagree.

The government offered evidence that, during the summer of 1970, DiFrancesco brought two boxes that contained dynamite, guns and various other items to a house in which Joseph Turri lived. DiFrancesco received permission from Turri to store the boxes in the basement. On the night of October 11, DiFrancesco removed a burlap bag from the box and brought it upstairs to Turri's apartment, where a meeting of the conspirators was held. There they used some of the material in the bag—dynamite, fuses and blasting caps—to construct the explosive devices which were used in the bombings. After the bombs had been made, the remaining material was put back into the bag. DiFrancesco then left the room with the bag and returned without it a short time later. No one actually saw DiFrancesco return

the bag containing the remaining explosives to the basement. Turri testified that he moved the boxes from the basement to the attic of his new residence during the summer of 1971. Turri's wife testified that DiFrancesco called her at some time in 1973 and asked her to move the boxes from the attic to another location, which she did.

Although none of the witnesses actually examined the contents of the boxes after the effective date of the statute, the jury properly could have inferred that some of the explosives remained in the boxes after that time. The evidence supported a logical inference that, when DiFrancesco left the October 11, 1970 meeting for several minutes and returned without the burlap bag, he had returned the bag containing the remaining explosive materials to the boxes in the basement, and that the explosives remained in the boxes while Turri moved them to his new residence and until DiFrancesco asked that they be moved again in 1973.

Government Appeal of the Sentence

Prior to the start of DiFrancesco's trial on the racketeering counts, the government, in compliance with 18 U.S.C. § 3575(a), filed a notice with the district court alleging that DiFrancesco was a "dangerous special offender," as defined in 18 U.S.C. § 3575(e)(3) and (f). The filing of such a notice indicates the government's intention to seek, if the defendant is convicted, imposition of an enhanced sentence as authorized by 18 U.S.C. § 3575(b).

On March 17, 1978, after DiFrancesco had been convicted in both the racketeering and bombing trials, Judge Burke held a sentencing hearing, required by § 3575(b), to obtain information which, with that submitted during trial, would form the basis for his determination whether DiFrancesco was a dangerous special offender. On April 21, the court issued findings of fact and its conclusion that DiFrancesco was a dangerous special offender. *United States* v. *DeFrancesco,* [sic] Cr. 76-45 (W.D.N.Y. April 21, 1978). One week later, the court sentenced DiFrancesco to concurrent ten year terms of imprisonment on the two racketeering counts, to be served concurrently with sentences totaling nine years which had been imposed by Judge Pratt on the bombing counts.

The government, under the authority granted by 18 U.S.C. § 3576,[11] filed a notice of appeal from the

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[11] 18 U.S.C. § 3576 provides:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court

sentence imposed by Judge Burke. DiFrancesco argues that the trial judge did not abuse his discretion in setting the sentence and, moreover, that such portion of § 3576 as authorizes the government to appeal a sentence where the defendant has not done so

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extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

violates the double jeopardy clause of the fifth amendment.[12] Since the government's right to appeal and thus our jurisdiction to consider the merits of the sentence are dependent upon the constitutionality of the statutory provision, *see United States* v. *Wilson*, 420 U.S. 332, 339 (1975), we must immediately confront the constitutional issue.[13]

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[12] Although DiFrancesco asserts that § 3576 also runs afoul of the due process and equal protection clauses of the fifth amendment, he frames his argument solely in terms of double jeopardy. In light of our disposition of the double jeopardy claim, we need not consider whether other constitutional provisions might also prohibit the government's appeal.

[13] Judge Haight argues in his opinion concurring in the result that § 3575 was inapplicable to DiFrancesco and that therefore it is unnecessary to reach the constitutional issue because (1) § 3575(f) provides that a defendant is "dangerous" if a period of confinement longer than that provided for such felony is required . . ."; (2) § 3575(b) provides for a maximum term of twenty-five years; and (3) DiFrancesco already was subject, without use of the dangerous special offender sentencing provision, to a total sentence of forty years, consisting of consecutive twenty-year terms for each of the two counts of which he was convicted.

However, a defendant who has been convicted on more than one count comes before the district court for sentencing on each of the counts for which he has been convicted. The determination whether a defendant is a "special offender" for the purpose of sentencing on each count depends upon whether the particular felony in question satisfies the requirements of § 3575(e). Moreover, the language of § 3575(f) refers to a need for confinement longer than that provided for the underlying "felony," not "felonies."

Therefore, the application of § 3575 depends on a particularized determination with regard to each of the felonies for which dangerous special offender sentencing is sought. Indeed, the district court did consider each of DiFrancesco's

The concept of a government appeal to obtain an increase in a valid, enforceable sentence [14] was unknown to the American legal system throughout most of this nation's two hundred year history. Few states have given their appellate courts any power to increase a sentence, and in each instance where the power exists, it may be exercised only if the defendant has initiated the appellate proceeding by seeking review of the sentence.[15] The United States, prior to 1970, did not have statutory authority to seek an

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two convictions separately and imposed separate, albeit concurrent, sentences for them. Since the maximum sentence of twenty years for each of DiFrancesco's two felony convictions was less than the twenty-five year term available under § 3575, the district court properly could find that the statute was applicable.

We express no opinion as to whether § 3575 authorizes the imposition of consecutive sentences totaling more than twenty-five years.

[14] Where the original sentence imposed by the trial court is invalid because of, *e.g.*, failure to impose a mandatory minimum penalty, the sentence may be corrected, even if doing so increases the punishment, because otherwise "no valid and enforceable sentence can be imposed at all." *Bozza* v. *United States*, 330 U.S. 160, 166 (1947). Here, however, the sentence imposed by Judge Burke was within that legally authorized and thus is enforceable.

[15] As of 1978, Alaska, Colorado, Connecticut, Maine, Maryland, Massachusetts, Montana and New Hampshire allowed appellate courts to increase a sentence, but only if the defendant sought review. Citations to these states' statutory provisions are collected in Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. Crim. L. & Criminology 19, 20 nn.7-8 (1978). This court knows of no state which subsequently has authorized an increased sentence upon prosecutorial appeal.

increase in a sentence. In that year, however, Congress enacted 18 U.S.C. § 3576, which provides that, in a case involving a dangerous special offender, "a review of the sentence on the record of the sentencing court may be taken by the defendant *or the United States* to a court of appeals." (Emphasis added.) The court of appeals is authorized to review "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused," and then to affirm the sentence, impose any sentence that the trial court could have imposed, or remand for further sentencing proceedings.

The government has not rushed to make use of its new power to seek review of sentences.[16] Whether this has resulted from doubts about the constitutionality of the procedure, an extraordinary degree of satisfaction with the sentences imposed under the dangerous special offender provision, a decision to allocate prosecutorial resources to other tasks, or other factors is of course only a matter of speculation, but

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[16] Such power also exists under 21 U.S.C. § 849, a similar provision which deals with "dangerous special drug offenders." This provision also was enacted in 1970. Since that time, legislation has been introduced in Congress, as part of the proposed comprehensive revision of the federal criminal code, to extend the government's power to seek sentence review beyond the dangerous offender context to encompass all cases in which the sentence imposed by the district court varies by some preestablished degree from proposed sentencing guidelines. See, *e.g.*, § 3725 of the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (1977). Such legislation has not been enacted.

this case is apparently the government's first attempt to obtain review of a sentence on appeal.[17] Moreover, the government's primary response to DiFrancesco's attack on the constitutionality of § 3576 is not that government-instigated review of a final sentence is constitutional, but rather that the sentence imposed by the district court is merely "tentative" and that thus the defendant is not placed twice in jeopardy.

The language of the statute does not support the construction urged by the government. Section 3575 (b) requires that, if the district court finds the defendant to be a dangerous special offender, it "*shall sentence* the defendant to an appropriate term not to exceed twenty-five years. . . ." (Emphasis added.)

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[17] The government has directed our attention to several other appellate decisions dealing with aspects of the dangerous special offender provisions. In none of these cases, however, did the government seek review of a sentence imposed under § 3575. Rather, the government has appealed a district court's refusal to sentence a defendant under the special provisions because, *e.g.*, the district court ruled that the government had failed to comply with § 3575's notice provision, *United States* v. *Ilacqua*, 562 F.2d 399 (6th Cir. 1977), *cert. denied*, 435 U.S. 917 (1978), or it held the statute to be unconstitutionally vague. *United States* v. *Stewart*, 531 F.2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976). In these cases, the court of appeals vacated the nonenhanced sentences imposed under the ordinary sentencing provisions and remanded for resentencing under § 3575. Although the defendants thereby were exposed to the possibility of an increased penalty upon resentencing, this danger resulted from their voluntary decisions to contest the use of § 3575 in the original proceedings. Thus, these previous cases did not involve the double jeopardy considerations raised by the government's attempt to appeal a sentence actually imposed under § 3575. See text, *infra*, at 24.

This command is not tentative; the sentence imposed is effective immediately.[18] This procedure contrasts with that provided in, *e.g.*, 28 U.S.C. § 636(b)(1), whereby a trial judge may designate a magistrate to conduct a hearing in certain matters and to submit "proposed" findings and recommendations, which have no force until they have been reviewed by the judge, who may accept, reject or modify them. Nor is the procedure here similar to that provision in 18 U.S.C. § 4205(c) (formerly 18 U.S.C. § 4208(b)), to which it is compared by the government. Section 4205(c) allows a court that desires more information before imposing sentence to commit the defendant to the custody of the Attorney General for a period which will "be deemed to be for the maximum sentence of imprisonment prescribed by law." After the court obtains the desired information, it then may affirm the original commitment or impose a different sentence which of course cannot exceed the aforementioned maximum prescribed term. "It is plain that as far as the sentence is concerned the original order entered under [§ 4205(c)] is wholly tentative," because "[t]he whole point of using [§ 4205(c)] is, in its own language, to get 'more detailed information as a basis for determining the sentence *to be imposed*. . . .' (Emphasis supplied.)" *United States* v. *Behrens*, 375 U.S. 162, 164-65 (1963). In contrast,

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[18] DiFrancesco is presently incarcerated in federal prison at Atlanta, Georgia, serving the sentences imposed by Judge Pratt and Judge Burke.

the commitment ordered by the district court pursuant to § 3575 is neither tentative nor merely a predicate to a sentence "to be imposed" by the court of appeals.

That Congress, as the government argues, could have written this statute in a manner analogous to § 4205(c) or in some other form which might not raise problems of double jeopardy is an inadequate response to the contention that the statute which Congress did write is constitutionally infirm. " '[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored,' at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." *Will* v. *United States*, 389 U.S. 90, 96 (1967) (citations omitted). Therefore, we are obliged to construe strictly the procedure that Congress has authorized and to determine whether it, not some other, hypothetical procedure, offends the double jeopardy clause.[19]

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[19] We note that at least some of the alternative procedures suggested by the government would raise issues that Congress did not have to consider in enacting § 3576. For example, a system whereby the district court tentatively imposed the maximum permissible sentence with provision for review and possible reduction by the court of appeals would likely result in an appeal of the sentence being taken by the defendant in every dangerous special offender case. This would increase the appellate caseload and in effect would reverse the usual presumption of finality which is accorded district court orders and judgments. Since we cannot know how Congress would weigh these additional considerations, we must reject the government's suggestion that a failure to read § 3576 in the

The plain command of the fifth amendment is that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." Although the phrase "life or limb" suggests only the most serious of penalties, it has long been established that it encompasses all penalties which may be imposed in criminal proceedings. *Breed* v. *Jones*, 421 U.S. 519, 528 (1975); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170-73 (1873). A defendant who has stood trial and been convicted and sentenced by the district court has been placed once in jeopardy. Had the position advocated by Mr. Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 134 (1904), prevailed, the double jeopardy clause might present no barrier to an increased sentence on appeal. Justice Holmes argued that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried." But the Supreme Court has never adopted this concept of "continuing jeopardy," which, although it might have simplified the matter of government appeals, *United States* v. *Scott*, 437 U.S. 82, 90 n. 6 (1978), would have greatly decreased the fifth amendment's protection against government oppression. The legislative history of § 3576 demonstrates that Congress was cognizant of possible constitutional objections to the provision, but that it concluded that

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light of possible alternatives will result in frustration of the Congressional intent.

We of course express no opinion as to the constitutionality of any alternative methods by which sentencing review might be accomplished.

Kepner's rejection of the continuing jeopardy concept should not apply to government appeal of a sentence rather than of an acquittal. S. Rep. No. 617, 91st Cong., 1st Sess. 95 (1969). We cannot perceive, however, how a defendant who, after being sentenced to several years' imprisonment by a district court, might be subject to imposition of a sentence of death upon a governmental appeal, would be any less placed twice in jeopardy of life or limb than was the defendant in *Kepner*, who, after acquittal in the court of first instance, was found guilty and sentenced to imprisonment for slightly less than two years upon appeal by the government. That § 3576 subjects a defendant "merely" to a longer term of imprisonment, not to the actual loss of his life, is a difference of degree, not principle, from the example given, for the double jeopardy clause applies equally to all criminal penalties. See *supra* at 18. Under the statute the government, dissatisfied with final judgment in one court, seeks a more favorable result in another tribunal. Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time "in jeopardy of life or limb."

Since this is the first attempt to use a statute allowing such an appeal, there are no precedents directly on point.[20] But the substantial body of

[20] The existing and proposed provisions for government appeal of sentences have generated a substantial amount of comment in the legal literature. Some commentators have argued that such provisions violate the guarantee against

double jeopardy case law, although hardly charting a straight-line path, *see, e.g., United States* v. *Scott, supra*, 437 U.S. 82, overruling *United States* v. *Jenkins*, 420 U.S. 358 (1975), supports the conclusion that we reach.

The guarantee against double jeopardy has been said to consist of three separate constitutional protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).[21] The interests underlying these protections are similar. *United States* v. *Wilson, supra*, 420 U.S. at 343. They promote the goal of preserving the integrity of final judgments, *Scott, supra*, 437 U.S. at 92, and protect the individual against oppression by the gov-

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double jeopardy, *e.g.*, Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 Maryland L. Rev. 739 (1978); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 Virginia L. Rev. 325 (1977), while others have contended that the provisions would be constitutional, *e.g.*, Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. Crim. L. & Criminology 19 (1978), and at least one commentator has surveyed the competing arguments and concluded that "the answer is simply unclear." Low, *Special Offender Sentencing*, 8 Am. Crim.L.Q. 70, 91 (1970).

[21] In addition, it is now clear that a defendant's "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949), is also encompassed by the double jeopardy clause. *Crist* v. *Bretz*, 437 U.S. 28, 36 (1978).

ernment. *Id.* at 99. More particularly, the protection against reprosecution after acquittal safeguards the individual against the embarrassment, expense and ordeal of repeated attempts by the government to use its resources and power to convict him and reduces the danger that an innocent defendant may be found guilty. *Serfass* v. *United States*, 420 U.S. 377, 387-88 (1975); *Green* v. *United States*, 355 U.S. 184, 187-88 (1957). And, at the root of the second and third of these protections is the idea, especially relevant here, expressed in *Wilson*, *supra*, 420 U.S. at 343:

> When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense.

This concern was perhaps most clearly expressed in *Ex parte Lange*, *supra*, 85 U.S. (18 Wall.) at 183:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constiution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment exe-

> cuted on the criminal, he can be again sentenced on that conviction to another and different punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

The prohibition against multiple punishment [22] has been so strongly felt, that, although the question of increasing a valid sentence has never been squarely presented, numerous courts, including the Supreme Court, have emphatically stated in dictum that such a procedure would be impermissible. In *United States* v. *Benz*, 282 U.S. 304 (1931), the Court was con-

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[22] The principle that the double jeopardy clause bars multiple punishment has not been undermined by the Supreme Court's statements that the prohibition of the double jeopardy clause "is not against being twice punished, but against being twice put in jeopardy." *United States* v. *Ball*, 163 U.S. 662, 669 (1896), and "is written in terms of potential or risk of *trial* and conviction, not punishment." *Breed* v. *Jones*, 421 U.S. 519, 532 (1975) (emphasis in original), *quoting Price* v. *Georgia*, 398 U.S. 323, 329 (1970). In each of those cases, the Court was not limiting the scope of double jeopardy protection, but instead was rejecting arguments that the clause prohibited *only* multiple punishment. The Court held that the double jeopardy clause prohibits retrial where the defendant has been the subject of an express, *Ball*, or implied, *Price*, acquittal, or of a juvenile proceeding in which he was found guilty but where no disposition was entered. *Breed*.

fronted with the question whether a district court has the power, upon petition by a defendant, to reduce the sentence previously imposed on him. The Court noted the then-prevailing general rule that judgments, decrees and orders could be amended, modified or vacated by the court that made them, during the term at which they were made. It stated that this rule applied to criminal cases, "provided the punishment be not augmented," *id.* at 307, and held that because the district court had decreased, not increased, the punishment, it had acted within its power.[23] The unanimous Court then stated that the distinction between decreasing and increasing a sentence was based "upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution. . . ." *Id.*

In *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900), the Supreme Court rejected the argument that the double jeopardy clause was offended when a defendant, whose original sentence had been vacated at his behest because the statute under which it was imposed was unlawfully applied, was resentenced under the appropriate statute to a term longer than the original one. The Court, however, distinguished the case before it from one in which "the [trial] court undertook to impose *in invitum* a second or

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[23] Rule 35 of the Federal Rules of Criminal Procedure now permits a district court to reduce a sentence within 120 days after the sentence is imposed or the conviction is affirmed on appeal.

additional sentence for the same offense, *or to substitute one sentence for another.*" *Id.* at 160 (emphasis added). And again in *Reid* v. *Covert*, 354 U.S. 1, 37 n. 68 (1957), Mr. Justice Black's plurality opinion, discussing the application of the Bill of Rights to military trials, stated:

> In *Swaim* v. *United States*, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional.

In *Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971), *cert. denied*, 407 U.S. 921 (1972), the court upheld the Massachusetts statute which allows a reviewing court to increase as well as decrease the sentence of a defendant who seeks sentence review. But the court explicitly noted that "the Massachusetts procedure does not permit the state to reopen the question of sentence on its own initiative. Were it to do so, it would of course violate the proscription against double jeopardy." *Id.* at 1211. Several other courts of appeal, including this one, have stated that a sentence may not be increased, at least where, as here, the punishment already has been partly suffered, *United States* v. *Chiarella*, 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954); *Oxman* v. *United States*, 148 F.2d 750, 753 (8th Cir.), *cert. denied*, 325 U.S. 887 (1945); *Frankel* v. *United States*, 131 F.2d 756, 758 (6th Cir. 1942); *Rowley* v. *Welch*, 114

F.2d 499, 501 n. 3 (D.C. Cir. 1940), and the defendant has not challenged the sentence. *United States* v. *Coke*, 404 F.2d 836, 845 (2d Cir. 1968) (en banc).

Although such dicta of course are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court.

The conclusion reached here does not conflict with the Supreme Court's decision in *North Carolina* v. *Pearce, supra*, 395 U.S. 711. There the Court held that the double jeopardy clause did not prohibit imposition of a greater sentence *on retrial* than had been imposed at the original trial of a defendant, *where the defendant succeeded in getting his first conviction set aside.* The Court relied in *Pearce* on *United States* v. *Ball*, 163 U.S. 662 (1896), which had established that "this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside," *Pearce, supra*, 395 U.S. at 720 (emphasis in original), and on *Stroud* v. *United States*, 251 U.S. 15 (1919), which held that a corollary of that power to retry was the power to impose any legally authorized sentence.

Although various rationales have been advanced and rejected for the rule that a defendant may be retried after reversal of an original conviction, *see Burks* v. *United States*, 437 U.S. 1, 15 n. 9 (1978), the Court most recently adopted, in its unanimous

opinion in *Burks*, *id.* at 15, the justification offered in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964):

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

This rationale,[24] however, does not fully explain the result in *Pearce* since a defendant would not be granted immunity from punishment if the sentence on retrial were limited to that imposed at the first trial. Rather, *Pearce* depends too on a second line of reasoning, that the double jeopardy protection simply has no relevance where "the orginal conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Pearce*, *supra*, 395 U.S. at 721. This outcome does not result from any "waiver" of double jeopardy protections, as was suggested in *Trono* v. *United States*, 199 U.S. 521, 533 (1905), and rejected in *Green* v. *United States*, *supra*, 355 U.S. at 191-92, but instead is compelled by the fact that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a

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[24] *Cf. Arizona* v. *Washington*, 434 U.S. 497, 509 (1978) (failure to allow retrial after mistrial declared because of "manifest necessity" would deprive society of its "one complete opportunity to convict those who have violated its laws"); *Bozza* v. *United States*, 330 U.S. 160, 166 (1947) (invalid sentence may be corrected even if doing so necessitates increase in punishment because otherwise "no valid and enforceable sentence can be imposed at all" and a convicted criminal will go free).

defendant from the consequences of his voluntary choice." *Scott, supra*, 437 U.S. at 99.

Here, however, neither factor that militated against the application of the double jeopardy clause to resentencing in *Pearce* is present. There is not the slightest danger than DiFrancesco will go unpunished if the government's appeal is dismissed. The ten-year terms imposed on him by Judge Burke are valid and enforceable, and in fact are already being served. Moreover, DeFrancesco has made no "voluntary choice" that has subjected him to jeopardy for a second time. He faces the risk of an increased sentence solely because the government desires a second chance to obtain a sentence satisfactory to it.[25]

We do not deny the existence of legitimate governmental interests that might be served by allowing the government to appeal a sentence, *e.g.*, improved

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[25] The government correctly does not contend that DiFrancesco has exposed himself to an increased sentence by appealing his conviction. Section 3576 distinguishes between an appeal of a conviction, which brings before us only the propriety of the process by which the defendant was convicted, and a review of a sentence. The statute allows the government to seek review of a sentence without regard to whether the defendant has chosen to appeal.

That it might be constitutionally permissible to impose consent to sentence review as a condition to exercise of a defendant's right to appeal, *cf. Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971) (constitutional to allow increase as well as decrease in sentence when defendant petitions for sentence review), a question which we need not decide, is irrelevant here, where § 3576 imposes no such condition. Considerations of due process would require that a defendant be informed of such a consequence of his decision to appeal.

uniformity in sentencing. But such interests must be pursued in alternative ways that do not conflict with the fifth amendment's guarantee against double jeopardy. "[W]here [, as here,] the Double Jeopardy Clause is applicable, its sweep is absolute. There are no equities to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks* v. *United States*, *supra*, 437 U.S. at 11 n. 6. To subject Eugene DeFrancesco [sic] for a second time to the risk of the entire range of penalties that the law provides for his crimes would violate that constitutional policy. The appeal by the government therefore must be dismissed.

The judgments of conviction are affirmed, and the appeal by the government is dismissed.

HAIGHT, *District Judge* (concurring in the result on the government's appeal).

I concur in Judge Smith's opinion affirming DiFrancesco's convictions, and agree that the government's appeal must be dismissed. However, I would base that dismissal upon the non-constitutional ground of the inapplicability of 18 U.S.C. § 3576 in the circumstances of this case.

In *United States* v. *Batchelder*, —— U.S. ——, 47 U.S.L.W. 4611, 4613 (No. 78-776, decided June 4, 1979), the Supreme Court reiterated the maxim "that statutes should be construed to avoid constitutional questions," going on to state:

> "This 'cardinal principle' of statutory construction . . . is appropriate only when an alternative interpretation is 'fairly possible' from the language of the statute. Swain v. Pressley, 430 U.S. 372, 378 n.11 (1977); see Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Sullivan, 332 U.S. 689, 693 (1948); Shapiro v. United States, 335 U.S. 1, 31 (1948)."

While neither DiFrancesco nor the government raised the issue below, this "cardinal principle" of statutory construction permits a court to consider *sua sponte* whether the sentencing procedures in §§ 3575 and 3576 can be interpreted so as to avoid the constitutional question. Clearly such an interpretation is "fairly possible" from the language of the statute.

Governmental appeal of a sentence under § 3576 is available only in respect of an individual properly proceeded against in the district court as a "dangerous special offender" under § 3575(a). To come within the statute, the offender must be both "special" as defined by § 3575(e), and "dangerous" as defined by § 3575(f). DiFrancesco qualifies as "special" under § 3575(e)(3).[1] He is "dangerous" under § 3575(f)

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[1] Section 3575 provides:

"(e) A defendant is a special offender for purposes of this section if—

"(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize,

if, and only if, "a period of confinement *longer than that provided for such felony* is required for the protection of the public from further criminal conduct by the defendant." (emphasis added).

Section 3575(b) provides in pertinent part:

> "If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony."

I construe the statute to provide the district judge with an additional capacity to impose a sentence of up to twenty-five years in cases where the underlying statute, standing alone, would not permit a term of such duration. Stated conversely, if the period of confinement provided for the felony by the underlying statute equals or exceeds twenty-five years, the dan-

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plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct or give or receive a bribe or use force as all or part of such conduct."

The district court found that the conspiratorial elements of the crimes for which DiFrancesco was convicted satisfied the requirements of the statute. A.51-56.

gerous special offender statute has no office to perform.[2]

If that is the proper interpretation of the dangerous special offender statute, it could not apply to Di-

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[2] The legislative history is not voluminous on the point, but such indications as there are favor this interpretation. The Assistant Attorney General, Criminal Division, writing to the House Judiciary Committee on the wording of § 3575(b), and particularly on the point of whether the statute should read "shall" sentence or "may" sentence, said in part:

> "We think that the term 'shall' as used here is appropriate. It conforms with the language generally used in the sentencing provisions of title 18, which has not previously been misconstrued as providing for a mandatory minimum sentence. Furthermore, inasmuch as an offender in any of the three defined categories is to be considered 'dangerous' *only when the court finds that a longer prison term than that may be imposed for the felony of which he has been convicted* is required to protect the public from further criminal conduct on his part, it would be incongruous for the court to fail to sentence a 'dangerous' offender to any prison term at all. Therefore, a provision that some such term of imprisonment 'shall' be imposed is appropriate for the purposes of the title. *If a court finds that the usual maximum term for the felony, or any lesser term, is all that should be imposed, by definition the court could not find the defendant to be a dangerous special offender.* The proposed change from 'shall' to 'may' therefore, would serve no purpose." 2 U.S. Code Cong. & Admin. News 4065-6 (1970) (emphasis added).

The House Report says of § 3575(f):

> "Subsection (f) provides that a defendant is 'dangerous' if confinement longer than that ordinarily provided is required to protect the public from further crime by him." *Id.* at 4039.

I construe the phrase "ordinarily provided" to mean the penalties provided by the underlying felony statute.

Francesco. DiFrancesco was prosecuted under the racketeering statute, 18 U.S.C. §§ 1961 *et seq.* He was convicted of a substantive offense under § 1961 (c),[3] and conspiracy under § 1961(d).[4] The district court had the unquestioned power under the underlying statute, entirely without regard to the dangerous special offender statute, to sentence DiFrancesco to two consecutive 20 year terms, for a total of 40 years,[5] or 15 years longer than the maximum term permitted by § 3576. The district court's discretionary power to impose consecutive, rather than

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[3] That section provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[4] That section provides:

"It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

[5] 18 U.S.C. § 1963 provides in pertinent part:

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962."

concurrent, sentences upon a defendant convicted on more than one count has been recognized for so long [6] that it may fairly be regarded as inherent in the "period of confinement . . . provided for such felony" by the underlying statute. In urging sentencing judges to impose consecutive sentences where the circumstances permit, prosecutors can and frequently do make the same arguments (the defendant is dangerous, the public must be protected) that the dangerous special offender statute contemplates.

Such arguments could have been made in the case at bar, and a sentence passed in excess of the maximum permitted by § 3576, entirely on the basis of the underlying felony statute, and the district court's well-established discretionary power to impose separate sentences on separate counts and make them run consecutively. I interpret §§ 3575 and 3576 to be inapplicable in those circumstances and would dismiss the government's appeal on that ground, leaving the

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[6] See *United States* v. *Dougherty*, 269 U.S. 360, 363 (1926), adopting the reasoning of *Neely* v. *United States*, 2 F.2d 849, 852-3 (2d Cir. 1924), which in turn relied upon the statement in *Ex Parte DeBara*, 179 U.S. 316, 322 (1900) that a court, by exercising such sentencing options, "may express its views of the criminality of a defendant . . ."

I do not find in the legislative history of the special dangerous offender act specific reference to the trial judge's ability to impose consecutive sentences in multiple count indictments, but the Congress must surely have been aware of so established a power.

constitutional question for a case in which it cannot be avoided.[7]

[7] If my interpretation of the statute is wrong, and the constitutional question is unavoidably presented by this case, then I am in complete agreement with Judge Smith's scholarly demonstration that the statute violates the double jeopardy clause of the fifth amendment.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of August one thousand nine hundred and seventy-nine.

Present: HON. J. JOSEPH SMITH
Circuit Judge

HON. THOMAS J. MESKILL
Circuit Judge

HON. CHARLES S. HAIGHT
District Judge

78-1250
78-1369
78-1371

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-APPELLANT

v.

EUGENE DIFRANCESCO,
DEFENDANT-APPELLANT-APPELLEE

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for

the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed and the appeal by the United States dismissed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

/s/ Arthur Heller

By: ARTHUR HELLER
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-183

UNITED STATES, PETITIONER

v.

EUGENE DIFRANCESCO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1979.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 28 day of August, 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301845 93

Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-567

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

EUGENE DIFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1979
CERTIORARI GRANTED FEBRUARY 19, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-567

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

EUGENE DIFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. CR 76-45

UNITED STATES OF AMERICA

v.

EUGENE DIFRANCESCO, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4-7-76	Filed Indictmet
4-14-76	Filed Govt's notice of readiness
9-12-77	Filed Application and Order sealing Notice purs. to Sect. 3575, T. 18, U.S.C. Said Notice shall remain sealed until ordered unsealed by this Court. ELFVIN, J.
9-13-77	Meeting in chambers w/counsel. Case is moved ready for trial. Jury is duly empaneled. Trial is adj. until 9-19-77.
9-28-77	Court opens purs. to adjournment.
10-31-77	The jury returns at 9:19 pm w/the following verdict: On Count One—Deft DiFrancesco—Guilty On Count Two—Deft DiFrancesco—Guilty
11-14-77	Filed an Application & Order that deft is a dangerous special offender notice be unsealed. ELFVIN, J. (filed & retained in Rochester)
11-14-77	Filed motion by govt. to set date for a special dangerous offender hearing. (filed & retained in Roch.)
3-17-78	Special Dangerous Offender Hearing. Submitted for decision after oral argument & exhibits introduced in evidence. Date for sentence to be set.

DATE	PROCEEDINGS

4-21-78 Fld govt's Findings of Fact.

4-28-78 Deft is sentenced as follows: The Crt: On each of Cts 1 & 2 I impose a sentence of ten yrs to run concurrently w/ea other & concurrently w/three sentences imposed by Judge Pratt on March 17, 1978 in this crt so long as the deft is held in custody on those sentences. This sentence is imposed under the sentencing provisions of Sect. 3575(b) of T. 18, U.S.C., the statute relating to dangerous special offenders, having been so found by me under findings filed 4-21-78.

4-28-78 Fld def'ts Notice of Appeal appealing fr judgment entered 4-28-78.

5-2-78 Fld Judgment & Comm. Ord. BURKE, J. Issued.

5-3-78 Fld Govt's Notice of Appeal appealing for review of the sentence imposed upon deft. 4-28-78.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 78-1250, 78-1369, 78-1371

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EUGENE DIFRANCESCO, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5-8-78	Filed copies of docket entries, notice of appeal & form B (DiFrancesco)
5-10-78	Filed copies of docket entries, notice of appeal (USA)
7-27-78	Filed record (original papers of district court)
8-16-78	Filed brief, appellant, with proof of service (by mail)
3-16-79	Appellee, DiFrancesco, brief filed—with proof of service (by mail)
4-17-79	Appellee-appellant U.S.A., reply brief filed-to brief filed by appellant DiFrancesco as appellee
4-20-79	Case argued before: Meskill, Smith, CJJ Haight, DJ
8-6-79	Judgment dismissed as to the United States Appeal and affirmed on defendant's appeal by published, signed opinion, filed—JJS, CJ Concurring opinion in the result on the government's appeal filed by Judge Haight, DJ
9-20-79	Mandate Issued (opinion and Judgment)

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

May 1975 Session

No. CR 76-45

THE UNITED STATES OF AMERICA

—*vs.*—

FRANK VALENTI, RENE PICCARRETO, EUGENE DiFRANCESCO a/k/a "Gene D", RICHARD MARINO a/k/a "Molly", JOSEPH LaNOVARA a/k/a "Spike", ANTHONY ARENA a/k/a "Nippy", JOSEPH NALORE, VINCENT RALLO

Vio. 18 U.S.C. 1962(c), 1962(d) & 2

Filed: April 7, 1976

COUNT I

The Grand Jury charges:

That continuously between approximately June 1, 1969 and August 31, 1973, in the Western District of New York and elsewhere, FRANK VALENTI, RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, JOSEPH LA NOVARA, ANTHONY ARENA, JOSEPH NALORE and VINCENT RALLO, the Defendants herein, and Vincent "Jimmy" Massaro (now deceased) and Angelo Monachino, named herein as coconspirators but not as defendants, and others who are both known and unknown to the Grand Jury, unlawfully did conspire, combine, confederate and agree together and with each other to commit an offense against the United States, that is: To conduct and to participate

directly and indirectly in the conduct of the affairs of an Enterprise through a pattern of racketeering activity in violation of Sections 1962(c) and 2 of Title 18 of the United States Code as hereinafter described:

1. At all times pertinent to this Indictment, the aforesaid Defendants, FRANK VALENTI, RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, JOSEPH LA NOVARA, ANTHONY ARENA, JOSEPH NALORE and VINCENT RALLO and the co-conspirators Angelo Monachino and Vincent Massaro were associated together in fact as an Enterprise, as defined by Title 18, United States Code, Section 1961 (4), to wit: A group of individuals associated in fact to commit arson and to defraud certain insurance companies.

2. Throughout much of the period pertinent to this Indictment, (a) FRANK VALENTI supervised and controlled the activities of the said Enterprise, (b) RENE PICCARRETO assisted FRANK VALENTI with supervision and control of the activities of the said Enterprise, (c) EUGENE DI FRANCESCO and RICHARD MARINO supervised the activities of certain members and associates of the said Enterprise, (d) ANTHONY ARENA, JOSEPH LA NOVARA, Angelo Monachino and Vincent Massaro were members and associates of the said Enterprise, and (e) JOSEPH NALORE and VINCENT RALLO were employees and associates of the said Enterprise.

3. At all times pertinent to this Indictment, the said Enterprise did engage in and its activities did affect interstate commerce.

4. At all times pertinent to this Indictment, the said Defendants and co-conspirators did conduct the affairs of the said Enterprise through a pattern of racketeering activity, that is:

(a) The said Defendants and co-conspirators would and did commit and wilfully cause to be committed multiple acts involving arson in violation of Articles 150 and 20 of the Penal Law of the State of New York; and

(b) The said Defendants and co-conspirators would and did commit and wilfully cause to be committed multiple

acts in violation of Sections 1341 and 2 of Title 18 of the United States Code—that is, having devised and intending to devise a scheme and artifice to defraud certain insurance companies and to obtain money and property therefrom by means of false and fraudulent representations, pretenses and promises regarding the facts and circumstances of certain fires which would and did damage certain buildings in and around the City of Rochester, New York; for purposes of executing and attempting to execute the said scheme and artifice to defraud, the said Defendants and co-conspirators unlawfully and wilfully did cause to be placed in certain post offices and authorized depositories for mail matter and to be taken and received therefrom certain matters and things to be sent and delivered by the Postal Service and knowingly did cause to be delivered by mail according to the directions thereon and at the place at which they were directed to be delivered by the person to whom they were addressed such matters and things, the said matters and things being more particularly described as insurance claims, statements of loss, sworn statements in proof of loss, and other reports, documents, memoranda, items, checks and drafts all relating to insurance claims as to various properties more particularly described herein.

5. It was part of the said conspiracy that the said Defendants and co-conspirators would and did commit, among others, the following acts:

(a) On or about January 26, 1970, EUGENE DI FRANCESCO and Vincent Massaro, at the direction of FRANK VALENTI, unlawfully did intentionally damage the building known as the Nickelodeon Tavern located at 884 Emerson Street, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Samuel Moschiano) and the owner of the business located therein (Patrick Marrocco) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE and VINCENT RALLO, the owner of the said premises (Samuel Moschiano) did fraudulently obtain insurance payments totaling approximately $87,760 from the Long Island In-

surance Company of Brooklyn, New York, and the New York Property Insurance Underwriting Association of Brooklyn, New York, and insurance payments totaling approximately $3,733.33 from the Great Southwest Fire Insurance Company of Mesa, Arizona, and insurance payments totaling approximately $1,866.67 from the Ambassador Insurance Company of Newark, New Jersey, and the owner of the said business located on the said premises (Patrick Marrocco) did fraudulently obtain insurance payments totaling approximately $37,240 from the Travelers Indemnity Company of Hartford, Connecticut, and the New York Property Insurance Underwriting Association of Brooklyn, New York, as well as insurance payments totaling approximately $2,615.00 from the Great Southwest Fire Insurance Company of Mesa, Arizona, all the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH NALORE and VINCENT RALLO.

(b) On or about February 18, 1971, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and Vincent Massaro, acting pursuant to the instructions of FRANK VALENTI and with the supervisory assistance of RENE PICCARRETO, unlawfully did intentionally damage the building located at 510-514 South Avenue, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Sebastian "Ben" Coglitore) to collect the insurance coverage thereon; and, thereafter, the owner of the said premises did fraudulently obtain insurance payments totaling approximately $36,511.60 from the United States Fire Insurance Company of New York, New York, and the New York Property Insurance Underwriting Association of Brooklyn, New York, the said insurance payment having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and RENE PICCARRETO.

(c) On or about October 17, 1971, EUGENE DI FRANCESCO and Angelo Monachino unlawfully did in-

tentionally damage the building located at 660 Mount Read Boulevard, Rochester, New York, by starting a fire therein for purposes of enabling Anthony Giardina, who then held a second mortgage on the said premises, to wilfully and fraudulently cause to be collected by Fred Boynton, the owner of the said premises who had no knowledge that arson had been committed upon the said premises, insurance payments totaling approximately $9,831.19 from the Aetna Casualty and Surety Company of Hartford, Connecticut, said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendant EUGENE DI FRANCESCO.

(d) On or about November 14, 1971, EUGENE DI FRANCESCO and Vincent Massaro unlawfully did intentionally damage the building located at 3253 Chili, New York, by starting a fire therein for purposes of enabling an owner of the said premises (Patrick Roncone) to collect the insurance coverage thereon; and, thereafter, the said owner of the said premises did fraudulently obtain insurance payments from the Nationwide Insurance Company, totaling approximately $17,500, the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendant EUGENE DI FRANCESCO.

(e) On or about December 25, 1971, EUGENE DI FRANCESCO, Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and under the supervision of RENE PICCARRETO and RICHARD MARINO, and with the assistance of RENE PICCARRETO and JOSEPH NALORE, unlawfully did intentionally damage the building known as the Select Tire Company located at 2100 Culver Road, Irondequoit, New York, by starting a fire therein for purposes of enabling the owners of the said premises (Anthony Giardina and Lawrence Uchie) to collect and cause to be collected the insurance coverage thereon; and, thereafter, the owners of the said premises did fraudulently obtain and cause to be obtained insurance payments totaling approximately $19,873.58 and $13,883.71 from the Travelers Indemnity Company of Hartford, Connecticut, insurance payments totaling approximately $32,589 from the Hart-

ford Insurance Company of Hartford, Connecticut, and insurance payments totaling approximately $120,000 from the General Accident Group Insurance Company of Atlanta, Georgia, and the General Cover Department of New York, New York, all the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, RENE PICCARRETO, JOSEPH NALORE and RICHARD MARINO.

(f) On or about April 10, 1972, EUGENE DI FRANCESCO, Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and pursuant to arrangements made by JOSEPH LA NOVARA and with the assistance of JOSEPH LA NOVARA, unlawfully did intentionally damage the building located at 1344 Pinnacle Road, Henrietta, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Mildred LaNovara) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE, the said owner of the said premises (Mildred LaNovara) did fraudulently obtain insurance payments totaling approximately $51,000 from the Travelers Indemnity Company of Hartford, Connecticut, the said insurance payment having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and JOSEPH NALORE.

(g) On or about May 21, 1972, EUGENE DI FRANCESCO, Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and pursuant to arrangements made by VINCENT RALLO and with the assistance of VINCENT RALLO, unlawfully did intentionally damage a barn located at or near 4251 Brick Schoolhouse Road, Hamlin, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Vicmar Development Corporation) to collect the insurance coverage thereon, and, thereafter, the owner of the said premises did fraudulently obtain insurance payments totaling approximately $14,000 from

the Hartford Insurance Company of Hartford, Connecticut, and the New York Property Insurance Underwriting Association of Brooklyn, New York, the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO and VINCENT RALLO.

(h) On or about March 17, 1973, ANTHONY ARENA and Vincent Massaro, acting at the direction of RICHARD MARINO and RENE PICCARRETO and pursuant to arrangements made by EUGENE DI FRANCESCO and with the supervisory assistance of Angelo Monachino, unlawfully did intentionally damage the building located at 504-508 South Avenue, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Sebastian "Ben" Coglitore) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE, the owner of the said premises (Sebastian Coglitore) did fraudulently obtain insurance payments totaling approximately $31,936.62 from the New York Property Insurance Underwriting Association of New York, New York, the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, ANTHONY ARENA and JOSEPH NALORE.

All of which was in violation of Section 1962(d) of Title 18 of the United States Code.

COUNT II

The Grand Jury further charges:

That continuously between approximately June 1, 1969 and August 31, 1973, in the Western District of New York and elsewhere, FRANK VALENTI, RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, JOSEPH LA NOVARA, ANTHONY ARENA, JOSEPH NALORE and VINCENT RALLO, the Defendants herein, unlawfully did conduct and participate, directly and indirectly, in the conduct of the affairs of an

Enterprise through a pattern of racketeering activity as hereinafter described:

1. At all times pertinent to this Indictment, the aforesaid Defendants, FRANK VALENTI, RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, JOSEPH LA NOVARA, ANTHONY ARENA, JOSEPH NALORE and VINCENT RALLO were associated together in fact as an Enterprise, as defined by Title 18, United States Code, Section 1961(4), to wit: A group of individuals associated in fact to commit arson and to defraud certain insurance companies.

2. Throughout much of the period pertinent to this Indictment, (a) FRANK VALENTI supervised and controlled the activities of the said Enterprise, (b) RENE PICCARRETO assisted FRANK VALENTI with supervision and control of the activities of the said Enterprise, (c) EUGENE DI FRANCESCO and RICHARD MARINO supervised the activities of certain members and associates of the said Enterprise, (d) ANTHONY ARENA, JOSEPH LA NOVARA, and Angelo Monachino and Vincent Massaro were members and associates of the said Enterprise, and (e) JOSEPH NALORE and VINCENT RALLO were employees and associates of the said Enterprise.

3. At all times pertinent to this Indictment, the said Enterprise did engage in and its activities did affect interstate commerce.

4. At all times pertinent to this Indictment, the said Defendants did conduct the affairs of the said Enterprise through a pattern of racketeering activity, that it:

(a) The said Defendants and others did commit and wilfully cause to be committed multiple acts involving arson in violation of Articles 150 and 20 of the Penal Law of the State of New York; and

(b) The said Defendants and others did commit and wilfully cause to be committed multiple acts in violation of Sections 1341 and 2 of Title 18 of the United States Code—that is, having devised and intending to devise a scheme and artifice to defraud certain insurance companies and to obtain money and property therefrom by

means of false and fraudulent representations, pretenses and promises regarding the facts and circumstances of certain fires which had damaged certain buildings in and around the City of Rochester, New York; for purposes of executing and attempting to execute the said scheme and artifice to defraud, the said Defendants and others unlawfully and wilfully did cause to be placed in certain post offices and authorized depositories for mail matter and to be taken and received therefrom certain matters and things to be sent and delivered by the Postal Service and knowingly did cause to be delivered by mail according to the directions thereon and at the place at which they were directed to be delivered by the person to whom they were addressed such matters and things, the said matters and things being more particularly described as insurance claims, statements of loss, sworn statements in proof of loss, and other reports, documents, memoranda, items, checks and drafts all relating to insurance claims as to various properties more particularly described herein.

5. And, the following specific acts of racketeering activity, among others, were committed in the course of conducting the Enterprise's affairs:

(a) On or about January 26, 1970, EUGENE DI FRANCESCO and Vincent Massaro, at the direction of FRANK VALENTI, unlawfully did intentionally damage the building known as the Nickelodeon Tavern located at 884 Emerson Street, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Samuel Moschiano) and the owner of the business located therein (Patrick Marrocco) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE and VINCENT RALLO, the owner of the said premises (Samuel Moschiano) did fraudulently obtain insurance payments totaling approximately $87,760 from the Long Island Insurance Company of Brooklyn, New York, and the New York Property Insurance Underwriting Association of Brooklyn, New York, and insurance payments totaling $3,733.33 from the Great Southwest Fire Insurance Company of Mesa, Arizona, and insurance payments

totaling approximately $1,866.67 from the Ambassador Insurance Company of Newark, New Jersey, and the owner of the said business located on the said premises (Patrick Marrocco) did fraudulently obtain insurance payments totaling approximately $37,240 from the Travelers Indemnity Company of Hartford, Connecticut, and the New York Property Insurance Underwriting Association of Brooklyn, New York, as well as insurance payments totaling approximately $2,615.00 from the Great Southwest Fire Insurance Company of Mesa, Arizona, all the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH NALORE and VINCENT RALLO.

(b) On or about February 18, 1971, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and Vincent Massaro, acting pursuant to the instructions of FRANK VALENTI and with the supervisory assistance of RENE PICCARRETO, unlawfully did intentionally damage the building located at 510-514 South Avenue, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Sebastian "Ben" Coglitore) to collect the insurance coverage thereon; and, thereafter, the owner of the said premises did fraudulently obtain insurance payments totaling approximately $36,511.60 from the United States Fire Insurance Company of New York, New York, and the New York Property Insurance Underwriting Association of Brooklyn, New York, the said insurance payment having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and RENE PICCARRETO.

(c) On or about October 17, 1971, EUGENE DI FRANCESCO and Angelo Monachino unlawfully did intentionally damage the building located at 660 Mount Read Boulevard, Rochester, New York, by starting a fire therein for purposes of enabling Anthony Giardina, who then held a second mortgage on the said premises, to wilfully and fraudulently cause to be collected by Fred

Boynton, the owner of the said premises who had no knowledge that arson had been committed upon the said premises, insurance payments totaling approximately $9,831.19 from the Aetna Casualty and Surety Company of Hartford, Connecticut, said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendant EUGENE DI FRANCESCO.

(d) On or about November 14, 1971, EUGENE DI FRANCESCO and Vincent Massaro unlawfully did intentionally damage the building located at 3253 Chili Avenue, Chili New York, by starting a fire therein for purposes of enabling an owner of the said premises (Patrick Roncone) to collect the insurance coverage thereon; and, thereafter, the said owner of the said premises did fraudulently obtain insurance payments from the Nationwide Insurance Company of Cleveland, Ohio, through the Syracuse Regional Office of the Nationwide Insurance Company, totaling aproximately $17,500, the said insurance payments having been obtained by utilization of the United States Mails which was wilfully caused by the Defendant EUGENE DI FRANCESCO.

(e) On or about December 25, 1971, EUGENE DI FRANCESCO, Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and under the supervision of RENE PICCARRETO and RICHARD MARINO, and with the assistance of RENE PICCARRETO and JOSEPH NALORE, unlawfully did intentionally damage the building known as the Select Tire Company located at 2100 Culver Road, Irondequoit, New York, by staring a fire therein for purposes of enabling the owners of the said premises (Anthony Giardina and Lawrence Uchie) to collect and cause to be collected the insurance coverage thereon; and, thereafter, the owners of the said premises did fraudulently obtain and cause to be obtained insurance payments totaling approximately $19,873.58 and $13,883.71 from the Travelers Indemnity Company of Hartford, Connecticut, insurance payments totaling approximately $32,589 from the Hartford Insurance Company of Hartford, Connecticut, and insurance payments totaling approximately $120,000 from the Gen-

eral Accident Group Insurance Company of Atlanta, Georgia, and the General Cover Department of New York, New York, all the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, RENE PICCARRETO, JOSEPH NALORE and RICHARD MARINO.

(f) On or about April 10, 1972, EUGENE DI FRANCESCO, Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and pursuant to arrangements made by JOSEPH LA NOVARA and with the assistance of JOSEPH LA NOVARA, unlawfully did intentionally damage the building located at 1344 Pinnacle Road, Henrietta, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Mildred LaNovara) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE, the said owner of the said premises (Mildred LaNovara) did fraudulently obtain insurance payments totaling approximately $51,000 from the Travelers Indemnity Company of Hartford, Connecticut, the said insurance payment having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO, JOSEPH LA NOVARA and JOSEPH NALORE.

(g) On or about May 21, 1971, EUGENE DI FRANCESCO(Vincent Massaro and Angelo Monachino, acting at the direction of FRANK VALENTI and pursuant to arrangements made by VINCENT RALLO and with the assistance of VINCENT RALLO, unlawfully did intentionally damage a barn located at or near 4251 Brick Schoolhouse Road, Hamlin, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Vicmar Development Corporation) to collect the insurance coverage thereon, and, thereafter, the owner of the said premises did fraudulently obtain insurance payments totaling approximately $14,000 from the Hartford Insurance Company of Hartford, Connecticut, and the New York Property Insurance Underwriting Association of Brooklyn, New York, the said insurance payments

having been obtained by utilization of the United States mails which was wilfully caused by the Defendants FRANK VALENTI, EUGENE DI FRANCESCO and VINCENT RALLO.

(h) On or about March 17, 1973, ANTHONY ARENA and Vincent Massaro, acting at the direction of RICHARD MARINO and RENE PICCARRETO and pursuant to arrangements made by EUGENE DI FRANCESCO and with the supervisory assistance of Angelo Monachino, unlawfully did intentionally damage the building located at 504-508 South Avenue, Rochester, New York, by starting a fire therein for purposes of enabling the owner of the said premises (Sebastian "Ben" Coglitore) to collect the insurance coverage thereon; and, thereafter, with the unlawful assistance of JOSEPH NALORE, the owner of the said premises (Sebastian Coglitore) did fraudulently obtain insurance payments totaling approximately $31,936.62 from the New York Property Insurance Underwriting Association of New York, New York, the said insurance payments having been obtained by utilization of the United States mails which was wilfully caused by the Defendants RENE PICCARRETO, EUGENE DI FRANCESCO, RICHARD MARINO, ANTHONY ARENA and JOSEPH NALORE.

All of which was in violation of Sections 1962(c) and 2 of Title 18 of the United States Code.

/s/ Richard J. Arcara
RICHARD J. ARCARA
United States Attorney

/s/ [Illegible]
Foreman

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

CR: 76-45

UNITED STATES OF AMERICA

-vs-

EUGENE DIFRANCESCO, DEFENDANT

Transcript of proceedings had in the above-entitled matter, before the HON. HAROLD P. BURKE, United States District Judge, in the United States District Court, Rochester, New York, on Friday, March 17, 1978.

APEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gregory Baldwin, Esq.)
Organized Crime & Racketeering Section
318 Federal Building
Rochester, New York 14614
Appearing on behalf of the Government.

PAUL R. SHANAHAN, ESQ.
OCS Building
Syracuse, New York 13202
Appearing on behalf of the Defendant.

[2] MR. BALDWIN: Your Honor, we have before the Court this morning pursuant to the Government's Notice filed prior to the trial of defendant Eugene DiFrancesco in Indictment 76-45, which was tried commencing last September 13, 1977, and which ended on October 31st, 1977, in which Mr. DiFrancesco was convicted on both counts.

In connection with that, the Government filed a Notice prior to trial pursuant to 18 U.S.C., Section 3575, also called a Special Dangerous Offender Notice. The Government submits, and the hearing that we are having today is for the purpose of enabling the Court to determine that the defendant, Eugene DiFrancesco, is pur-

suant to Section 3575 of Title 18, United States Code, a Special Dangerous Offender, and accordingly, should be sentenced in connection with the provisions of that statute.

Now, Your Honor, the statute requires first that an offender be a special offender within the terms of the statute, which requires that at the time of commission of the crime in question, which is the two counts for which Mr. DiFrancesco was convicted, the racketeering organization counts, and the conspiracy, that he be over the age of twenty-one years. It re- [3] quires that the conviction consist of a felony and that that felony involve a conspiracy consisting of three or more persons in addition to the defendant, Mr. DiFrancesco, and further, it requires that in connection with that conspiracy or that crime, that the defendant initiate, organize, direct, manage, supervise all or part of that conspiracy. That is what the Government is required to show by a preponderance of the evidence to establish Mr. DiFrancesco as a special offender under this statute.

As for a dangerous offender, Your Honor, Section 3575 (f) of Title 13 states that an individual is a dangerous offender if a period of confinement longer than that provided for in the triggering offense, or for the offense to which he is convicted, is required for the protection of the public from further criminal conduct by the defendant.

Your Honor, first I would like to address myself to the question of whether or not Mr. DiFrancesco is a special offender within the meaning of the statute. The offense to which brings us to this point involves two counts. The first count was violation of Title 18, United States Code, Section 1962(c), which charged that [4] Mr. DiFrancesco and others operated a business whose pattern of activity was racketeering activity and that the activity was the arranging of arsons in violation of New York law and the commission of mail fraud in violation of the Federal law.

The indictment specified eight separate arsons, or fires, that took place in the Rochester area. And according to the testimony in that trial, which was held before you,

Your Honor, Mr. DiFrancesco was involved in varying degrees in all eight of those arsons.

The conspiracy charge in Indictment 76-45 in violation of Section 1962(d) was alleged and proven to have existed between June of 1969 and August of 1973.

Now the indictment, Your Honor, I would like to have marked as Government's Exhibit 1. I have a certified copy of the indictment, and I submit it into evidence pursuant to Rule 902 of the Federal Rules.

(Government's Exhibit 1 marked for identification.)

MR. SHANAHAN: This is the indictment of CR: 76-45?

MR. BALDWIN: That's correct.

I move it into evidence, Your Honor.

[5] THE COURT: It is received.

(Government's Exhibit 1 marked in evidence.)

MR. BALDWIN: Your Honor, referring to Government's Exhibit 1, which is the indictment for which Mr. DiFrancesco was convicted, the indictment clearly by its title and by the charges in both counts involve Mr. DiFrancesco. It also involves as a co-conspirator Mr. Angelo Monachino, who is an unindicted co-conspirator but who by his own admission and his testimony during this trial stated that he was a co-conspirator in this crime.

It also names Mr. Joseph LaNovara as an unindicted co-conspirator and Mr. LaNovara by his own admission was a co-conspirator in this crime along with Mr. DiFrancesco.

It also names Mr. Vincent Rallo as a defendant and as a member of this conspiracy. And Mr. Rallo himself was convicted for the conspiracy and substantive count.

It also names as an unindicted co-conspirator Mr. Vincent Massaro, who is now deceased. He was named as a co-conspirator in the conspiracy by Mr. [6] Angelo Monachino and by Mr. Joseph LaNovara in their testimony.

Now the charge, Your Honor, involved the pattern of conduct which was unlawful under the law of the State

of New York, and that law was the Law of New York Penal Code, Article 150, which outlaws arson, and Article 150.10, arson in the third degree.

And I request that the Court at this time take judicial notice of the fact that the pattern of conduct in Government's Exhibit 1, which is the original indictment, the pattern of conduct involves violation of New York law and also violation of Federal law, and the Federal law being Title 18 of the United States Code, Section 1341, mail fraud.

I have a request for judicial notice and I present it into evidence at this time.

THE COURT: All right. Mark it for identification.

(Government's Exhibit 2 marked for identification.)

MR. SHANAHAN: Your Honor, as I look at this Exhibit, it sets forth various quotations from the New York State Penal Law, which deal with the crime of [7] arson, and then it contains various other matters which Mr. Baldwin agrees do not apply in connection with this hearing. So as far as it contains reference to the New York Penal Law and definitions from the New York Penal Law, I have no objection to it.

MR. BALDWIN: We submit that portion of it into evidence, Your Honor.

THE COURT: Received.

(Government's Exhibit 2 marked in evidence.)

MR. BALDWIN: Your Honor, the testimony in the trial of Indictment 76-45, Government's Exhibit 1, showed that Mr. Eugene DiFrancesco, the subject of the hearing here, initiated, organized, directed, managed and supervised at least a part of the conspiracy, and this much is proven, Your Honor, proven by the fact that the jury has found Mr. DiFrancesco guilty of the conspiracy which necessarily entails that there did exist a conspiracy and that he was a member and necessarily entails acceptance of the testimony in support of that conspiracy.

To establish the conviction, Your Honor, I have here a certified copy of the minutes of the jury's [8] return of

a verdict of guilty on Mr. DiFrancesco and Mr. Rallo, and I move that into evidence.

MR. SHANAHAN: Is this a stenographic transcript of the verdict?

MR. BALDWIN: Yes.

(Government's Exhibit 3 marked in evidence.)

MR. BALDWIN: Now the testimony which supports the verdict of guilty and which is reflected in Government's Exhibit 3 took place in the trial which occurred before you, Your Honor, between September 13th and October 31st, 1977. In relation to each of the eight arsons that are listed in the indictment, Government's Exhibit 1, as a pattern of racketeering activity, the first is the Nickelodian Tavern on 884 Emerson Street, which occurred in January, 1970.

Mr. Monachino testified in that, that Mr. DiFrancesco admitted that he had prepared the Nickelodian Tavern with James Massaro or Vincent Massaro for a fire and that he had directed and supervised it, and that Vincent Rallo had assisted in setting up that fire, arranging for the arson itself.

The second fire was at 510-514 South Avenue, [9] which took place in February of 1971. In connection with that fire, Joseph LaNovara testified that Mr. DiFrancesco took he and Mr. Massaro to that location, told them where to set up the fires, instructed them on how to set up the fires, and told them what to do, and that this fire was initiated, organized, directed and supervised and managed by Mr. DiFrancesco.

Mr. Monachino testified that Mr. DiFrancesco later after the fire admitted to him that he had assisted in preparing the location on South Avenue for the blaze.

Sebastian Coglitore, the owner of the building, testified that he set up this arson through Mr. DiFrancesco at Mr. DiFrancesco's initiative and his suggestion and that all the financial arrangements were made with Mr. DiFrancesco and through Mr. DiFrancesco.

The Government submits that in this fire also Mr. DiFrancesco initiated, directed, supervised and managed the conduct of the felony involved.

The next fire was 660 Mt. Read Boulevard in October of 1971. Angelo Monachino testified in connection with that that he had been telephoned by Mr. [10] DiFrancesco after the fire and taken there to that location and that while there, Mr. DiFrancesco stated that maybe he should do it over again alone because it hadn't been that successful a fire.

Anthony Giardina, who had a financial interest in the building and who had assisted the owner, Mr. Boynton, in purchasing it, testified that he set up this arson with Mr. DiFrancesco directly and that Mr. DiFrancesco came out to that location and with Mr. Giardina reviewed the property and explained the details of the fire. He stated that he met with Mr. DiFrancesco after the fire, at Mr. DiFrancesco's request, while certain debris was removed because there was danger of some sort of inspection or investigation by an arson squad.

Sebastian Coglitore testified that he, Mr. Coglitore, arranged for the financing of this arson directly with Mr. DiFrancesco in behalf of Anthony Giardina.

Again, the Government submits that this fire also was initiated, organized, directed, managed and supervised by Mr. DiFrancesco.

The fourth fire was 3253 Chili Avenue in [11] November, 1971. Mr. Coglitore's testimony before this Court in that case was that he met with Mr. DiFrancesco and the owner of the building, Dr. Patrick Roncone, in order to spell out the terms of the fire, the timing of the fire, and what the finances would be, and also to put the two of them, Mr. DiFrancesco and Dr. Roncone together for the purpose of arranging the fire itself.

Angelo Monachino testified that he had heard the order to Mr. DiFrancesco that he go out and burn the location and that he, Mr. Monachino, delivered materials out to that location at Mr. DiFrancesco's request in order to assist them in burning the place down. He was told at that time by Mr. DiFrancesco where the fire would be set in the building, and after the fire Mr. DiFrancesco admitted to him that he had set the fire and that it had gone well, although sometime after that he again admitted that he was receiving complaints because the fire

had not totally destroyed the premises at 3253 Chili Avenue.

Again, on the basis of the testimony, Your Honor, it is clear that Mr. DiFrancesco initiated, organized, directed, managed and supervised this

[12] The fifth fire was at the Select Tire Company in December of 1971. The testimony before Your Honor from Angelo Monachino was that prior to the fire he was taken there by Mr. DiFrancesco. Mr. DiFrancesco gave orders to Mr. Monachino concerning flammable liquid. He instructed Mr. Monachino to make sure that the owners had gotten at least a barrel of flammable liquid to be used in helping to set and spreading the fire.

Mr. Monachino also testified that he collected money from the owners on behalf of Mr. DiFrancesco; that Mr. DiFrancesco was present when that money was collected; that he directed the preparations for the fire himself in person, and that later after the fire he admitted to Mr. Monachino that he had, in fact, set the fire himself after the preparations had been made by Mr. Monachino and others under Mr. DiFrancesco's supervision.

Anthony Giardina, who was a co-owner of the Select Tire Company, testified before this Court and jury that he arranged for that fire in particular through Mr. DiFrancesco directly, and that Mr. DiFrancesco made the arrangements for the terms of the fire and the [13] amount to be paid; that Mr. DiFrancesco instructed Mr. Giardina and Mr. Uchie when to be present at the location in order to let them into the building and when to be away from the location, and that he, Mr. Giardina, paid money to Mr. DiFrancesco himself in return for this arson. And again their testimony establishes, Your Honor, that Mr. DiFrancesco initiated, supervised, managed, directed and helped to organize the fire at the Select Tire Company.

The next fire occurred at 1344 Pinnacle Road in April of 1972, Your Honor. The testimony before this Court relating to Mr. DiFrancesco's role in that fire first was from Mr. Joseph LaNovara, who owned the house. He, through Mr. Valenti, directed Mr. DiFrancesco to burn

the house. Mr. DiFrancesco was responsible for and did, in fact, get the men to help him to burn that house and also got the supplies necessary to burn that house, and Mr. DiFrancesco himself, according to Mr. LaNovara, actually made the preparations for this fire.

Angelo Monachino testified before the Court that he was taken by Mr. DiFrancesco to the scene of this fire and that along with Mr. Vincent Massaro and [14] under Mr. DiFrancesco's supervision, the preparations were made for the setting of the fire at 1344 Pinnacle Road. He also testified that later after the preparations were made, later on that night, he went back to the scene with Mr. DiFrancesco and Mr. Massaro, dropped them off, and while he drove up the road and returned, they went into the house and actually set the fire itself. He then drove them off.

Again, the Government submits that this testimony shows that Mr. DiFrancesco initiated, supervised, managed, directed and organized the setting of this fire in the conduct of this felony.

The seventh fire was a barn out in Hamlin, New York. That fire occurred in May of 1972. Angelo Monachino testified as to Mr. DiFrancesco's role in this fire, that Mr. DiFrancesco himself gave the instructions to Angelo Monachino as to when, where and how this fire would take place. Angelo Monachino went out to the barn in Hamlin with Mr. DiFrancesco and with Mr. Massaro and there they proceeded to set up or to make the preparations for the fire. Angelo Monachino actually helped set this fire. Later they returned after the preparations had been made on Mr. [15] DiFrancesco's orders and the fire was actually set.

Robert Del Monache, the owner of the barn, stated that he had set up this fire and made the arrangements through Mr. Vincent Rallo, but according to the testimony, Your Honor, Mr. DiFrancesco in major part helped to organize, supervise, manage and direct the conduct of this felony, of this arson, at the barn in Hamlin.

The last fire that was involved in the indictment, Your Honor, Government's Exhibit 1, was at 504-508 South Avenue, which took place in March, 1973. The testimony by Mr. Sebastian Coglitore, who owned that building, was

that he was told by Mr. DiFrancesco to do it in order to spend, what he characterized, as credit or money that he had coming to him from other fires. His testimony was basically that Mr. DiFrancesco in the arson organization owed him money, and he wanted to collect that money back, and Mr. DiFrancesco stated to him, "The only way you are going to get it back is by having the rest of that building on South Avenue burned down," which he proceeded to do. Mr. DiFrancesco, according to him, made the initial arrangements, although Angelo Monachino made the final arrangements [16] and collected the money. But, again, this was also initiated by Mr. DiFrancesco.

Also, Your Honor, according to Angelo Monachino and Joseph LaNovara in their testimony concerning this pattern of conduct and this series of arsons, there was a business, a highly organized business, which was conducting these arsons. They testified that Mr. DiFrancesco, at least up until mid-1972, was a captain in that organization and that, as such, he gave them orders and supervised them and Mr. Massaro in the various conduct of the affairs of this business, which involved almost all of the fires named in the indictment.

This litany of criminal acts in which Mr. DiFrancesco was involved and which clearly are a pattern of activity were proven beyond a reasonable doubt at trial. And the fact that a conspiracy existed and that Mr. DiFrancesco was involved in it and that Mr. DiFrancesco initiated, organized, supervised, managed and directed at least a part of that conspiracy was also proven beyond a reasonable doubt at the trial before Your Honor. These acts constitute as a whole a pattern of criminal conduct which is in violation [17] of the New York law and in violation of the Federal law; the New York law being Article 150, which Your Honor has judicial notice of relating to arson; the Federal law being mail fraud in violation of Section 1341, which Your Honor has taken judicial notice of.

Finally, Your Honor, Mr. DiFrancesco was over the age of twenty-one at the time the crime was committed. He was born on June 15, 1934. I have a certified copy

of his birth certificate, which I move into evidence at this time.

(Government's Exhibit 4 marked in evidence.)

MR. BALDWIN: Now as I noted initially, Your Honor, Title 18 of the United States Code, Section 3575, states that an individual is a special offender if he is over twenty-one years of age at the time the crimes were committed, if he stands convicted of a felony, and that felony was a conspiracy, or the defendant was acting in furtherance of the conspiracy with three or more other persons; if that felony involved the engagement and a pattern of conduct which was criminal under the applicable laws of any jurisdiction, which in our case would be the laws of New [18] York, the Federal laws, and that the defendant did or agreed to initiate, organize, plan, manage, direct or supervise all or a part of the conspiracy. Mr. DiFrancesco was clearly over the age of twenty-one at the time these crimes occurred. That is shown by Government's Exhibit 4, his birth certificate.

He stands convicted of a felony in which involved three or more other persons. That is shown partially by Government's Exhibit 3, which are the minutes of Mr. DiFrancesco's conviction, which show the existence of a conspiracy, the membership of Mr. Vincent Rallo and by their own admission Mr. Monachino and Mr. LaNovara as well as Mr. Massaro. There are at least four other individuals proven to have been involved in this conspiracy as well as Mr. DiFrancesco. The fact that the pattern of conduct was in violation of the applicable criminal laws as shown through Government's Exhibit 2, which relates to the New York law against arson, as well as Federal law against mail fraud.

And finally, the fact that the defendant did or agreed to initiate, organize, plan, manage, direct or supervise all or a part of this conspiracy is [19] shown by the sworn testimony which was subjected to intense cross examination and which was given before this Court during the trial.

In regard to the question of whether or not Mr. DiFrancesco is a dangerous offender, the statute describes

a dangerous offender as a person who requires a period of confinement longer that that provided for by the statute itself, Section 1962, a period required that long for the protection of the public from further criminal conduct by the defendant.

Mr. DiFrancesco's criminal history is based upon proven crimes, crimes proven in open court beyond a reasonable doubt and not upon speculation or hearsay. The first was the Nickelodian Tavern fire, which consisted of two felonies, at least, that of arson in violation of New York law, and that of mail fraud. That took place in January of 1970. It is supported by Government's Exhibit 1 and 3.

Secondly, in the summer of 1970, Mr. DiFrancesco was involved in the unlawful storage of dynamite in violation of Title 18, United States Code, Section 842(j), which is a misdemeanor, and also was involved in the destruction of Federal property in violation of [20] Title 18, United States Code, Section 1341, and conspiracy, and this all relating to the Columbus Day bombings of October, 1970.

In support of this, Your Honor, the Government submits a certified copy of the Indictment 75-165 and the minutes of Mr. DiFrancesco's conviction on these three counts that I have just related.

(Government's Exhibits 5 and 6 marked in evidence.)

MR. BALDWIN: To go on with Mr. DiFrancesco's history of criminal conduct, the next event was in February of 1971. That was the arson at 510-514 South Avenue. That involved two felonies again, arson and mail fraud. That is supported by Government's Exhibits 1 and 3. Also through June, July and August of 1971, Mr. DiFrancesco was involved in loansharking. That was summarized in an indictment which was handed down, Indictment No. 75-38 and tried before this Court. Mr. DiFrancesco was convicted of Title 18, United States Code, Section 892 and Section 894, which is conspiracy to make extortionate extensions of credit and the making of such extensions of credit and conspiracy to use ex-

tortionate means to collect credit [21] and the actual doing so.

In support of that, Your Honor, the Government submits a certified copy of Indictment 75-38 and also a certified copy of the judgment and commitment reflecting Mr. DiFrancesco's conviction on all counts of that indictment.

(Government's Exhibits 7 and 8 marked in evidence.)

MR. BALDWIN: In that period of activity through June, July and August of 1971 involved a commission of four additional felonies as supported by Government's Exhibits 7 and 8.

The next crime was October, 1971, the next proven crime, I should say, which involved the arson at 660 Mt. Read Boulevard, and that, again, involved two felonies, arson and mail fraud, and it is supported by Government's Exhibits 1 and 3.

The next proven crime took place in November of 1971, the fire at 3253 Chili Avenue, which again involved arson and mail fraud, two felonies.

December of 1971, the Select Tire Company. Again, arson and mail fraud.

April of 1972, the fire at 1344 Pinnacle Road. [22] Again, arson and mail fraud.

May of 1972, the barn on Brick School House Road in Hamlin. Again, involving arson and mail fraud.

March of 1973, the fire at 504-508 South Avenue. Again, involving arson and mail fraud.

Finally, November of 1973, which is the murder of Vincent Massaro and the conspiracy to commit murder. Now it is well-known that that conviction of Mr. DiFrancesco for that murder has been reversed. The basis of that reversal is the fact that the corroborating evidence supplied by the Monroe County Sheriff's Department was, in fact, perjured, according to former Detective William P. Marks, and on the basis of that statement, the conviction was reversed. There is no indication whatsoever, however, Your Honor, that the main witnesses in that case who testified to Mr. DiFrancesco's

involvement and Mr. DiFrancesco's actual commission of that murder told anything but the truth, and those witnesses are Angelo Monachino and Joseph LaNovara.

Now Section 3577 of Title 18 states that there is no limit set on the information that a Court can hear concerning the question of whether an individual [23] is a special offender or a dangerous offender. There is no question, I would submit, as to whether or not Mr. Monachino or Mr. LaNovara told the truth in that case. There is absolutely no attack upon their testimony whatsoever, and it was accepted by the jury. Consequently, I submit into evidence a certified copy of Mr. DiFrancesco's judgment and commitment in that case also.

MR. SHANAHAN: If the Court please, in view of the fact that that particular conviction was not reversed but actually was vacated and set aside, I would object to the certificate of conviction now sought to be offered in evidence in this case.

MR. BALDWIN: By the terms of the statute, there is no limit upon the evidence that the Court may hear and consider in connection with this case. I submit it as showing the testimony of Mr. Monachino and Mr. LaNovara in connection with this act performed by Mr. DiFrancesco in regard to the murder. Whether he stands convicted formally of it or not, the fact remains that he was found guilty on the basis of that testimony.

MR. SHANAHAN: Counsel is offering a certifi- [24] cate of conviction that no longer has any validity.

THE COURT: This is only argument. I will consider it when I decide the case.

(Government's Exhibit 9 marked for identification.)

MR. BALDWIN: In March of 1975 pursuant to Mr. DiFrancesco's loansharking conviction before this Court, he was sentenced to eighteen months in jail. He was released on or about April 1st, 1976.

In November, 1976, he was convicted of murder and conspiracy to commit murder and ultimately sentenced to twenty-five years to life. That, again, was reversed in January of 1978, but Mr. DiFrancesco was incarcerated between November and January of 1978. He is

now again in Federal custody pursuant to a sentence imposed by Judge Pratt this morning in connection with the Columbus Day Bombing case.

But the point is that since January of 1970 and January of 1978, in that eight-year span and of that period of time, the defendant has spent in jail twenty-six months, a little over two years. Of the remaining seventy months of that eight-year span, between January of '70 and January of '78, the defend- [25] ant has committed proven twenty-four felonies which, if averaged out, comes out to a felony about once every three months. And in support of these felonies and in support of my statement that they are proven felonies, I refer to Government's Exhibits 5 through 8 in evidence and Government's Exhibit 9, which is marked for identification and whose admission into evidence pends your decision.

This history of criminal activity and felonies one after another shows a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the people of this community. It shows a complete and utter disregard on the part of Mr. DiFrancesco for the public safety. It shows that Mr. DiFrancesco is nothing less than a hardened criminal upon whom leniency is wasted, because Mr. DiFrancesco is in no way going to be rehabilitated in any way whatsoever.

I submit that this criminal history, which is based solely upon proven crimes, Your Honor, is indicative of a need to put Mr. DiFrancesco in jail for as long as is possible under the law in order to protect the public from further criminal conduct.

[26] THE COURT: In other words you are asking for the absolute maximum?

MR. BALDWIN: Yes, sir. I should say in connection with that, that the only one real consideration the Government would submit in this sentencing is that of protection of the public by keeping Mr. DiFrancesco away from the public and by keeping him incarcerated.

Now the statute, Section 3775(b), states that if it appears by a preponderance of the information submitted

to the Court, including information submitted during the trial for which the defendant is now to be sentenced, that the defendant is a special dangerous offender, he should be sentenced under the terms of Section 3575(b) of Title 18 of the United States Code which provides a maximum sentence of twenty-five years.

THE COURT: Now that is the double maximum. That is the maximum provided by the statute for the crime plus an additional five years?

MR. BALDWIN: Yes, sir. It would be a maximum of twenty-five years altogether.

THE COURT: It is a maximum plus the maximum?

[27] MR. BALDWIN: I'm not sure if I follow, Your Honor.

THE COURT: You are asking for more than the statute provides for the commission of the crimes, and you are asking an additional five years because I find him a habitual criminal?

MR. BALDWIN: Yes, Your Honor.

THE COURT: That is a maximum and maximum?

MR. BALDWIN: Yes, sir. The Government submits it has shown that Mr. DiFrancesco is a special offender and that he is a dangerous offender, and the Government also submits that, therefore, he should be sentenced to the maximum sentence which can be imposed by this Court.

MR. SHANAHAN: I assume that means that the Government has rested with that final statement.

If the Court please, so far as the factual matters that have been submitted to Your Honor, the various certified copies of Exhibits and such as that, there is no evidence that I can offer that would—

THE COURT: About the only thing that's new here this morning that I have heard here is his birth certificate.

[28] MR. SHANAHAN: I think that's right. Now I do have some quarrel with the arguments that counsel made between each Exhibit, but as far as offering any evidence to the Court, factual evidence, I can't see that there is anything that I could offer that would controvert these various public records which I assume would all be

part of your probation report, in any event. So I have no presentment that I wish to make in connection with this.

THE COURT: Very well. I will consider the matter submitted now.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CR. 76-45

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

EUGENE DIFRANCESCO, DEFENDANT

FINDINGS OF FACT

On October 31, 1977, the defendant Eugene DiFrancesco was convicted before this Court on two counts contained in the above indictment. Count I of that indictment charged the defendant with conspiring with Vincent Rallo, Angelo Monachino, Joseph LaNovara, Vincent Massaro and others to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962(d). The pattern of racketeering activity consisted of eight arsons (in violation of New York law) and eight mail frauds (in violation of federal law), all of which are described in detail in the indictment. Count II charged the defendant, Vincent Rallo, Angelo Monachino, Joseph LaNovara, Vincent Massaro and others with actually conducting the affairs of an enterprise through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962(c). The same pattern of arson and mail fraud is alleged in Count II as in Count I.

On September 12, 1977, the United States filed a Notice with the Honorable John T. Elfvin, United States District Judge, Western District of New York, setting forth the Government's belief that the defendant Eugene DiFrancesco is a dangerous special offender within the meaning of sections 3575(e)(3) and 3575(f) of Title 18 of the United States Code. The Government also made known in that Notice that, upon conviction of Mr. Di-

Francesco, it would request that he be sentenced pursuant to the provisions of section 3575(b) of Title 18 of the United States Code. This Notice was sealed by Judge Elfvin and copies were provided to the defendant's attorney, Paul Shanahan, within twenty-four hours of the filing of the Notice.

The defendant DiFrancesco was convicted on both counts of the indictment on October 31, 1977. Following his conviction the Notice was ordered unsealed by Judge Elfvin and a copy of it was presented to this Court for the first time along with the Government's motion to set a date for a hearing on the Notice. Upon receipt of that motion this Court ordered that Mr. DiFrancesco's presentence report be provided to the Government and Mr. Shanahan. The requested hearing was held on March 17, 1978. An earlier date was not available due to the fact that Mr. Shanahan was conducting the defense of a murder trial in a local court through the months of November and December 1977; Mr. DiFrancesco himself was on trial for another matter in the United States District Court, Western District of New York in Rochester during the month of January 1978 and consequently the hearing was not held in order to avoid prejudicial news reports which might have affected jurors in that case; and during February 1978 another trial was underway which was factually very closely related to the present case and in which Mr. DiFrancesco was named as a co-conspirator, and consequently the hearing was again postponed to avoid the danger of publicity prejudicial to that defendant.

On March 17, 1978, the hearing requested by the Government was held in open court and in the presence of Mr. DiFrancesco and his attorney, Paul Shanahan. The defense was notified of this date by this Court on February 27, 1978. At the hearing the Government presented no witnesses, relying instead upon the sworn testimony of the Government witnesses who appeared before this Court in the felony trial at which Mr. DiFrancesco had been convicted, and a number of certified public documents relating to Mr. DiFrancesco's past record as well as the charges in this case. The defense presented no

witnesses and raised no objection or contradiction to the accuracy of the Government's explanation of the trial testimony or to the documents used by the Government.

Section 3575(b) requires that a defendant may be found a dangerous special offender if it appears "by a preponderance of the information, including information submitted during the trial . . . and sentencing hearing" that the conditions of subsections 3575(e) and (f) are satisfied, and if the defendant was over the age of 21 years at the time of the commission of the felony for which he was convicted. It is the finding of this Court, based upon the facts as found below, that the Government has met the imposed burden and that the defendant Eugene DiFrancesco is, within the meaning of the statute, a dangerous special offender.

SECTION 3575(a)

Initially the statute requires that the defendant, to be a dangerous special offender, must have been over the age of 21 years at the time of the commission of the offense, which must itself be a felony. The crimes for which the defendant was convicted occurred between December 1, 1969, and August 31, 1973. The defendant reached the age of 21 years on June 15, 1955, and consequently he was over the age of 21 at the time of the commission of the crime. This Court relies specifically upon Government's Exhibit G4, which is a certified copy of Mr. DiFrancesco's certificate of birth admitted into evidence at the March 17th hearing without objection.

The crimes for which the defendant was convicted on October 31, 1977, are described above and are violations of Sections 1962(c) and 1962(d) of Title 18, United States Code. A certified copy of the indictment in this case was admitted into evidence without objection at the March 17th hearing as Government's Exhibit G1. Sections 1962(c) and 1962(d) are clearly felonies in that Section 1963 imposes a term of twenty years imprisonment for their violation.

SPECIAL OFFENDER

The Government has alleged in its Notice that Mr. DiFrancesco is a special offender specifically within the terms of Section 3575(e)(3). To be a special offender within that section it is necessary: first, that the felony for which the defendant was convicted was, or was committed in furtherance of, a conspiracy; second, that the conspiracy involved three or more persons in addition to the defendant; third, that the conspiracy and conduct involved engaging in a pattern of conduct criminal under the laws of any applicable jurisdiction; and fourth, that the defendant did, or agreed that he would initiate, organize, plan, finance, direct, manage or supervise all or part of the conspiracy or conduct.

1. The defendant has been convicted of two felonies: a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d)) and the substantive offense of conducting the affairs of the same enterprise in the same manner (18 U.S.C. 1962(c)). The convictions are established by the certified copy of the clerk of court's minutes for October 31, 1977, relating to this case and which were admitted into evidence during the March 17th hearing without objection as Government's Exhibit G3.

The two crimes for which he was convicted are clearly set out in the indictment (G1 in evidence). The trial testimony of Angelo Monachino and Joseph LaNovara established that an enterprise or organization existed which maintained formal membership, a hierarchy of ranks, a chain of command, iniation procedures and rules and regulations. The business of this organization, or rather the goal of this conspiracy, of which Monachino and LaNovara both were members, was among other things arson and mail fraud. They also testified that other members of the organization included the defendant, Vincent Rallo and Vincent Massaro. This sworn testimony established the existence of the conspiracy described in Count I of the indictment. The membership of the defendant, Angelo Monachino, Joseph LaNovara,

Vincent Rallo and Vincent Massaro was established by the sworn trial testimony of Monachino and LaNovara as well as of Sebastian Coglitore, Anthony Giardina and Robert DelMonache concerning the individual acts of those members themselves. The testimony of these same witnesses also established that the actual conduct of the affairs of the enterprise through arsons and mail frauds was done in furtherance of the conspiracy outlined in Count I and proven at trial. Consequently this Court finds that a preponderance of the information establishes that the crimes for which the defendant stands convicted constituted a felony conspiracy (Count I, 18 U.S.C. 1962 (d)) as well as a felony committed in furtherance of that conspiracy (Count II, 18 U.S.C. 1962(c)).

2. The felony conspiracy (Count I) and the felony conduct (Count II) involved at least three persons in addition to the defendant DiFrancesco. These were Vincent Rallo who was, with the defendant here, convicted on both counts of the indictment. The Court relies upon the certified copy of the Clerk of Court's minutes (G3) which recorded Rallo's conviction, and upon the sworn trial testimony of Angelo Monachino and Robert DelMonache in support of this. In addition, Joseph LaNovara was an admitted member of the conspiracy and participant in the felony on the basis of his own sworn admission before this Court during the trial itself and on the basis of his plea of guilty to the conspiracy (Count I) entered before this Court on July 7, 1976. Further, Angelo Monachino was an admitted member of this conspiracy, as alleged in the indictment (G1) based upon his own sworn admissions before this Court during the trial and upon the sworn trial testimony of Joseph LaNovara, Sebastian Coglitore and Anthony Giardina. A fourth member of the conspiracy and participant in the felony in addition to the defendant was Vincent Massaro, as alleged in the indictment (G1) and as shown by the testimony of Angelo Monachino, and Joseph LaNovara. Mr. Massaro died in November 1973 after the conclusion of the crimes for which the defendant was convicted.

The sworn testimony taken during trial before this Court from Angelo Monachino and Joseph LaNovara, the

guilty plea of Joseph LaNovara and the conviction of Vincent Rallo together establish by a preponderance of the information that there were at least four other members of the conspiracy and participants in the substantive felony other than the defendant and that these were Vincent Rallo, Angelo Monachino, Joseph LaNovara and Vincent Massaro.

3. The conspiracy and the substantive offense for which the defendant was convicted was to engage in a pattern of conduct criminal under the applicable laws of the State of New York and the United States. Both Counts I and II of the indictment allege that the defendant and others conducted the affairs of an enterprise through a "pattern of racketeering activity," and in each case that pattern of racketeering activity involved eight arsons, in violation of Article 150 of the New York Penal Code (itself a Class C felony) and eight "mail frauds" in violation of Section 1341 of Title 18, United States Code (also a felony). This pattern of conduct was alleged in both counts of the indictment (G1) as an integral part of the conspiracy and the substantive felony. Both Angelo Monachino and Joseph LaNovara testified under oath at trial that they and the defendant and others were "members" or "associates" of the enterprise referred to in the indictment. That enterprise, as noted above, maintained formal membership, various ranks and a chain of of command, and required the formal initiation of its members. It also promulgated various rules for its membership, among which were obedience by members to those in command and silence concerning its activities. They further testified that the "business" of this enterprise was, among other things, the commission of arson in return for a percentage of the insurance proceeds collected as a result of the arson. Arson is, as this Court has judicially noticed in Government's Exhibit G2, a felony punishable by the applicable laws of New York, the State in which each of the eight named arsons were committed. Further, the use of the mails to collect insurance proceeds under such circumstances constitutes mail fraud in violation of federal law (18 U.S.C. 1341). That arsons and mail frauds were committed was estab-

lished by the trial testimony of the owners of six of the premises burned (Sebastian Coglitore, Anthony Giardina, Joseph LaNovara and Robert DelMonache) as well as by the arsonists themselves (Angelo Monachino and Joseph LaNovara). This testimony also established that the enterprise was engaged specifically in the business of arson and mail fraud over a period of over three years and that the defendant was deeply involved in each crime. This habitual conduct of a similar nature over so long a period, especially when it involves a highly organized "business" enterprise, clearly establishes a pattern of conduct on the part of the defendant, conduct which was illegal under New York law (G2) and federal law (18 U.S.C. 1341).

4. The proof at trial showed that the defendant initiated, organized, planned, directed, managed and supervised at least part of the conspiracy and the substantive crime for which he was convicted. As noted above, the sworn trial testimony of Angelo Monachino and Joseph LaNovara showed the existence of a well-organized enterprise operating an arson-for-hire business in the Rochester area. That testimony also showed that Mr. DiFrancesco held the position of "captain" at least between February 1971 when Monachino and LaNovara were initiated into the enterprise, and about July 1972. During this period six of the eight arsons took place. As a "Captain" in this enterprise, Monachino and LaNovara testified that the defendant supervised a number of men in the execution of criminal activities as ordered by the enterprise leaders. This supervision included selecting those men who would prepare a location for arson with him (on several occasions LaNovara and Monachino themselves were designated by the defendant for this job as well as actively working on the preparations himself. The trial testimony of Monachino and LaNovara also showed that the defendant arranged for the various materials used in starting the arsons, such as excelsior and light wood, and insured their delivery to the locations to be burned as well as directed others in their use.

Further, DiFrancesco actually instructed and supervised others such as Massaro and LaNovara in how to

use those materials to prepare arsons. This was testified to by Joseph LaNovara concerning the fire at 510-514 South Avenue, and by Angelo Monachino concerning the Select Tire Company fire.

The trial testimony of the owners of the buildings, and in particular the trial testimony of Sebastian Coglitore, showed that the defendant actively recruited business for the arson enterprise. Indeed, the trial testimony of Sebastian Coglitore shows that it was the defendant himself who suggested to Coglitore the burning of 510-514 South Avenue in February 1971 in return for insurance proceeds, and it was the defendant who told Coglitore the only way to secure a return of money owed by the defendant to Coglitore was to use it as a "credit" for a down payment on the burning of 504-508 South Avenue in March 1973. In other fires it was the defendant to whom other owners went when they wished to burn property. This is shown by the testimony of Anthony Giardina as it related to the fires as 660 Mount Read Boulevard and the Select Tire Company and by the testimony of Sebastian Coglitore as it related to the fire at 3253 Chili Avenue.

The trial testimony of Angelo Monachino, Joseph LaNovara, Sebastian Coglitore and Anthony Giardina show by a preponderence of information that the defendant initiated, in whole or part, at least six of the eight arsons; that he organized the preparation of those premises for arson by designating the individuals to help him in those preparations and in securing materials for the arsons; that he planned the date on which the fires would occur; and that he directed, managed and supervised members of the conspiracy such as Monachino, LaNovara and Massaro in the performance of their duties with the enterprise, at least insofar as those duties related to arson.

DANGEROUS OFFENDER

The Government has alleged in its Notice and at the March 17th hearing that, as section 3575(f) requires, the defendant is a dangerous offender because a period of confinement longer than that provided for violation of

section 1962 is required for the protection of the public from further criminal conduct by the defendant.

A review of the defendant's criminal record shows four other convictions in state and federal court for crimes committed since 1970 in the Rochester area. The same review reveals a history of virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977.

The defendant's criminal history, as proven by convictions in this and other courts, began in January 1970 with the arson at the Nickelodeon Tavern, 884 Emerson Street, Rochester, and the resultant mail fraud. This crime was one of those included in the indictment (G1) for which the defendant was convicted (G3), and which was testified to at trial by Angelo Monachino.

These two felonies were followed in the summer of 1971 by the defendant's unlawful storage of dynamite and blasting caps, a misdemeanor. The dynamite was later used by the defendant and others in October 1970 to destroy federal property in Rochester as well as other property. On January 25, 1978, he was convicted of violation of 18 U.S.C. 842(j), unlawful storage of explosives; 18 U.S.C. 1361, destruction of federal property; and 18 U.S.C. 371, conspiracy. The indictment in that case, as well as the minutes of the conviction, were admitted into evidence at the March 17th hearing without objection as Government's Exhibits G5 and G6, respectively.

These crimes were followed in February 1971 by the arson at 510-514 South Avenue, and the resultant mail fraud. This crime was also included in the indictment (G1) for which the defendant was convicted, and the defendant's role in this arson and mail fraud was testified to by Joseph LaNovara and Sebastian Coglitore.

In the months of June, July and August 1971 the defendant made an extortionate extension of credit in the amount of $1,000 and used extortionate means to collect that loan. This loansharking activity led to the defendant's conviction in March 1975 before this Court on two counts of violating 18 U.S.C. 892 (making extortionate

extensions of credit, and conspiracy) and on two counts of violating 18 U.S.C. 894 (using extortion to collect credit, and conspiracy.

In October 1971 the arson at 660 Mount Read Boulevard occurred followed by mail fraud. This crime was included in the indictment (G1) for which the defendant stands convicted, and the defendant's role in those crimes was testified to by Angelo Monachino and Anthony Giardina.

In November 1971 the arson at 3253 Chili Avenue occurred, followed by mail fraud. In December, arson and mail fraud were committed in relation to the Select Tire Company. In April 1972 arson and mail fraud were committed by him at 1344 Pinnacle Road. In May 1972 arson and mail fraud were committed by him in relation to a barn in Hamlin, New York, and in March 1973 he made the initial arrangements for arson at 504-508 South Avenue, again followed by mail fraud. Each of these crimes are included in the indictment (G1) for which the defendant stands convicted, and the trial testimony of Angelo Monachino, Joseph LaNovara, Sebastian Coglitore, Anthony Giardina and Robert DelMonache showed his deep involvement in each of those crimes.

In November 1973 the defendant conspired to murder Vincent Massaro and did murder him. In November 1976 he was convicted of this crime in the Monroe County Court, as shown by Government's Exhibit 9 admitted into evidence without objection at the March 17th hearing. This conviction was reversed in February 1978 when it was found that the necessary corroborating evidence (without which the case could not have reached the jury) was perjured. Nevertheless, the fact that the testimony of the major witnesses against him there, Angelo Monachino and Joseph LaNovara, has not been shown or even claimed to be perjurious, and the fact that the defendant was convicted shows that at least a preponderance of evidence implicated him in the crime. While this conviction is merely cumulative in relation to the defendant's criminal history and is by no means the sole point upon which this Court finds the defendant to be a dangerous offender, it is indicative of the defend-

ant's continuous criminal activity since 1970 and is validly considered by this Court in relation to the issues here under Section 3577.

This criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. The defendant, by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal conduct by the defendant, Eugene DiFrancesco.

In sum, this Court, on the basis of the facts above, finds that the defendant was over the age of 21 years when the crimes for which he stands convicted were committed; that the defendant stands convicted of two felonies; that one felony was committed in furtherance of a conspiracy (18 U.S.C. 1962(c)); that the other felony was itself a conspiracy (18 U.S.C. 1962(d)); that the conspiracy and the substantive crime involved at least four persons other than the defendant, and these were Vincent Rallo, Angelo Monachino, Joseph LaNovara and Vincent Massaro; that the conspiracy and the substantive crime was to engage in a pattern of conduct which was criminal under the laws of the State of New York (New York Penal Code, Article 150) and of the United States (18 U.S.C. 1341); that the defendant did initiate, organize, plan, direct, manage and supervise at least part of the conspiracy and the substantive criminal acts; [and that confinement of the defendant for a period longer than that provided for violation of 18 U.S.C. 1962(c) or 1962(d) is required for the protection of the public from further criminal conduct by the defendant.]*

WHEREFORE, it is the finding of this Court that the defendant Eugene DiFrancesco, having been con-

* The bracketed phrase was printed in the findings, but a line had been drawn through it by hand.

victed of two felony charges before this Court on October 31, 1977, and having been over the age of 21 years at the time of the commission of those felonies is a dangerous special offender within the meaning of sections 3575 (e)(3) and 3575(f) of Title 18 of the United States Code, and therefore subject to the sentencing provisions of section 3575(b) of Title 18 of the United States Code.

/s/ Harold P. Burke
HAROLD P. BURKE
United States District Judge

Dated at Rochester, New York,

April 21, 1978.

Entered April 21, 1978

/s/ HPB
U.S.D.J.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

CR: 76-45

UNITED STATES OF AMERICA

—*vs*—

EUGENE DIFRANCESCO, DEFENDANT

SENTENCE

Transcript of proceedings had in the above-entitled matter, before the HON. HAROLD P. BURKE, United States District Judge, in the United States District Court, Rochester, New York, on Friday, April 28, 1978.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gregory Baldwin, Esq.)
Organized Crime & Racketeering Section
318 Federal Building
Rochester, New York 14614
Appearing on Behalf of the Government.

PAUL R. SHANAHAN, ESQ.
OCS Building
Syracuse, New York 13202
Appearing on behalf of the Defendant.

[2]

Rochester, New York
Friday, April 28, 1978
1:30 p.m.

MR. BALDWIN: For sentencing, Your Honor, Docket No. 76-45, United States versus Eugene DiFrancesco. Let the record reflect that the defendant, Mr. Di-

Francesco, is present in court with his attorney, Mr. Paul Shanahan.

MR. SHANAHAN: Your Honor, at this time the matter is before you for sentence. I have to say this, that I had a jury come in in Utica about one thirty this morning, and as a result I have not had too much of an opportunity to review the file. However, I would like to point out to Your Honor that this defendant now has been incarcerated for a period of three years originally on a sentence that you imposed some time ago in 1975.

On the completion of that sentence he was released on bail, and that bail was terminated as a result of some testimony by the Monroe County Sheriff's [3] Department, and he has been incarcerated ever since.

Now it has been, I think, approximately one hundred and eighty days since the conviction in this court. I'm sure as a result of previous proceedings and Your Honor's familiarity with the case, having presided over it, that there is not a great deal beyond that that I can say at this time.

I would respectfully ask that Your Honor be as lenient as you feel you can under all the circumstances.

THE COURT: I'm speaking now to the defendant himself. You have a right to make a statement before I impose sentence if you care to. You don't have to, but I have to afford you the opportunity to do so.

DEFENDANT DI FRANCESCO: No, sir.

THE COURT: On each of Counts 1 and 2, I impose a sentence of ten years, to run concurrently with each other and concurrently with three sentences imposed by Judge Pratt on March 17, 1978, in this court, so long as the defendant is held in custody on those sentences. This sentence is imposed under the sentencing provisions of Section 3575(b) of Title 18, United States Code, the statute relating to Dangerous [4] Special Offenders, having been so found by me under findings filed April 21, 1978.

That is the sentence.

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 79-567

UNITED STATES, PETITIONER

v.

EUGENE DIFRANCESCO

ORDER ALLOWING CERTIORARI

Filed February 19, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317791 281

79-567

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, Petitioner

vs.

EUGENE DiFRANCESCO, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Eugene DiFrancesco, by his attorney, Edgar C. NeMoyer, moves the Court for an order permitting him to proceed in this Court, in forma pauperis in response to the petition of the Government for a writ of certiorari, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent's attorney.

BOREANAZ, NeMOYER & BAKER
Edgar C. NeMoyer, Of Counsel
Counsel for Respondent
736 Brisbane Building
Buffalo, New York 14203
Telephone (716) 854-5800

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner

v. AFFIDAVIT

EUGENE DiFRANCESCO,

Respondent

UNITED STATES OF AMERICA)
WESTERN DISTRICT OF NEW YORK) :SS

EDGAR C. NeMOYER, being duly sworn, deposes and says that:

1. Your deponent is the attorney in this Court for the defendant, Eugene DiFrancesco, and as such is fully familiar with the facts and circumstances herein.

2. The Respondent herein desires to respond to the petition of the Government to this Court for a writ of certiorari. However, the Respondent, due to his indigency, is unable to afford the substantial printing costs which he would have to incur in filing his Reply Brief.

3. By Order dated December 13, 1979 the United States Court of Appeals for the Second Circuit granted the Respondent's, Eugene DiFrancesco, request for appointed counsel pursuant to the Criminal Justice Act for the purpose of responding to the Government's petition for a writ of certiorari herein. A copy of this Order is attached hereto and made a part hereof. The Respondent is presently incarcerated and has been such for the past few years, and is totally without any funds.

4. As a result of the foregoing, your deponent requests that the Respondent be permitted to proceed in this Court in forma pauperis, and in accordance therewith file the Respondent's Reply Brief pursuant to the mandate of Rule 47 of the Supreme Court Rules.

WHEREFORE, your deponent prays that the Respondent may have leave to proceed in this Court in the manner stated in forma pauperis.

Edgar C. NeMoyer

EDGAR C. NeMOYER

Sworn to before me this
25th day of January, 1980.

Salvatore A Bottaro

SALVATORE A. BOTTARO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 80

79-567

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SUPREME COURT, U.S.

AFFIRMATION OF SERVICE

I hereby certify that this 25th day of January, 1980, I have caused to be served by mail, three copies of the Respondent's Reply Brief to the Petitioner's petition for a writ of certiorari upon Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530.

Edgar C. NeMoyer

EDGAR C. NeMOYER
Attorney for Respondent

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79-567

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

United States of America,

Petitioner

v.

Eugene DiFrancesco,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Telephone (716) 854-5800

10

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1979

No.

UNITED STATES OF AMERICA, Petitioner,

v.

EUGENE DiFRANCESCO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the United States, has petitioned for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit in this matter.

OPINION BELOW

The opinion of the Court of Appeals is attached to the Petitioner's petition as Appendix A, and can be found in 604 F. 2d 769 (2nd Cir.--1979).

QUESTION PRESENTED

Whether this is a proper case for this Court to grant certiorari to review the Constitutionality of Title 18 United States Code 3576.

STATEMENT

The defendant, Eugene DiFrancesco, was convicted in two trials in the District Court of Western New York. After the two convictions a hearing was held on March 17, 1978, wherein the attorneys for the Government made certain allegations regarding Eugene DiFrancesco but

no testimony was taken. Mr. DiFrancesco's then attorney, Paul Shanahan, said "I have no presentation that I wish to make in connection with this." The Government then submitted a proposed 11 page "Findings of Fact" which Judge Harold T. Burke signed with the exception of striking the following language from the proposed Findings "And that confinement of the defendant for a period longer than that provided for a violation of 18 U.S.C. 1962 (c) or 1962(d) is required for the protection of the public from further criminal conduct by the defendant." The Government in citing a portion of the Judge's findings on pages 6 and 7 of their Petition, Footnote 2, would appear to be attempting to mislead this Court when they state that the Court below found Eugene DiFrancesco "to be a hardened habitual criminal from whom the public must be protected for as long a period as possible".

In sentencing Eugene DiFrancesco, the Judge imposed a sentence far less than the maximum provided and also, directed that the majority of the sentence be served concurrently with time previously imposed on the other conviction. In other words, the Judge's sentence belies a finding by him that Mr. DiFrancesco should be incarcerated for as long a period as possible and supports his obvious intent, in striking the language in the Government's proposed Findings, that the defendant be confined for a period longer than that provided.

Eugene DiFrancesco is presently incarcerated and is indigent.

REASONS FOR DENYING THE PETITION

1. This is not a good case for this Court to decide this issue. Neither Eugene DiFrancesco nor his attorney has any great interest in the long term effect of the Constitutionality of the statute herein involved. The Government is, of course, very interested in preserving

this statute. A proper case, with real parties in interest, will be presented to this Court when a defendant receives an increased sentence on review by a Circuit Court of Appeals. In that situation, a defendant will be directly effected and consequently, motivated to attack the Constitutionality of this statute.

2. The statute involved, namely, Title 18 U.S.C. 3575, provides in (f) "A defendant is dangerous for purposes of this Section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." Obviously here the Judge did not make such a required finding. The sentence actually imposed was much less than that provided for such a felony as charged. It is submitted that the Judge acquiesced in the proposed findings submitted by the Government because in all probability it would make no difference.

3. The Government in their petition cite North Carolina v. Pearce, 395 U.S. 711 (1969) for the proposition that a defendant may be resentenced to a longer term after a retrial then he received at his first trial. The Government appears to place much emphasis on the rationale they attribute to that case, namely, that increased sentencing is not absolutely prohibited by the Constitution. It is submitted that North Carolina v. Pearce, supra, does not in actuality support the Government's position. The Court there stated, at Page 723, "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" The Court further stated, also at 723, that "The freedom of a sentencing judge to consider the defendant's

conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, **". Here no new information is permitted for the reviewing court. All the information is available for the sentencing judge in imposing his original sentence and therefore, contrary to North Carolina v. Pearce an increased sentence would be based upon the same facts and not as therein provided on new information.

In its reason for granting its petition, the Government claims that the decision of the United States Court of Appeals for the Second Circuit has nullified an act of Congress which "was carefully drafted with constitutional considerations in mind. Page 9. However, a review of the legislative history of 18 U.S.C. 3576 indicates that one of the constitutional factors considered was the fact that this provision may be violative of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The Congressional Committee considering the Dangerous Special Offender Sentencing Statutes, 18 U.S.C. 3575-3578 was itself cognizant of the potential Fifth Amendment ramifications of 18 U.S.C. 3576 when it invited the United States Justice Department to comment upon the American Bar Association recommendations in this area, 1970 United States Code Congressional and Administrative News, P. 4068-4070. The ensuing comments submitted to the Committee by the Justice Department involved a detailed discussion of the Constitutional aspects of 18 U.S.C. 3576, albeit one which supported constitutionality.

However, dissenting views of Representative John Conyers, Jr., Representative Abner Mikva and Representative William F. Ryan presented to the Committee set forth a position that 18 U.S.C. 3576 was in violation of the Double Jeopardy Clause of the Fifth Amendment.

It should not therefore come as a surprise to the Government, when the first Appellate Court requested by the Government to increase a sentence appealed by it, decides that such a procedure is unconstitional. The opinion of the United States Court of Appeals for the Second Circuit is amply supported by legal authority and logic.

The Government argues unconvincingly that 18 U.S.C. 3576 does not permit multiple punishments for the same offense, but clearly establishes a new appellate for use by the Government when it is dissatisfied with the sentencing imposed by the District Court Judge. It therefore affords the Government the ability to obtain on its own initiative an increase in the sentence of the defendant. It is submitted that the Court of Appeals for the Second Circuit was correct when it stated therein. "Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the Government is to place him a second time "in jeopary of life and limb." (30a).

In this context it is this Court's words in ex parte Lange, 85 U.S. (18 WALL.) 1963 (1873) at P. 183 which sets forth the Double Jeopardy concept as follows:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronouned on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgement has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a

> case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument ssems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

See also United States v. Benz, 282 U.S. 304 (1931).

The Court of Appeals amply discussed this issue in its opinion, and persuasively held that 18 U.S.C. 3576 created the imposition of multiple punishments upon a defendant, with a resultant double jeopardy violation.

In discussing the issues before it, the Court in Walsh v. Picard, 44 F. 2d 1209 (1st Cir. 1971), referred to the aforementioned concept and stated:

> "As in Pearce, the Massachusetts procedure does not permit the State to reopen the question of sentence on its own initiative. Were it to do so, it would of course violate the proscription against double jeopardy. (id. at 1211).

In United States v. Coke, 404 F. 2d 836 (2nd Cir. en banc, 19) it was held that "no policy of the Double Jeopardy Clause is offended when as a consequence of a retrial of the same offense resulting from proceedings taken by the accused to correct trial error, a higher punishment is imposed." (id at 841). However, the Court did discuss the double jeopardy immunity provided to a defendant on appeal, and it stated that it was:

> "An immunity from having a sentence increased at the instance of the State (id at 844) ...
>
> Where double jeopardy protection is in effect -- and this may be everywhere, Cf. U.S. ex rel. Hetenyi v. Wilkins, 348 F. 2d 844 (2nd Cir. 1965), the Court cannot increase the sentences of prisoners who do not challenge them after these have become final. (id at 845).

The Government's further position that the sentence imposed pursuant to 18 U.S.C. 3575 is not final, is not even supported by the statute itslef. 18 U.S.C. 3575(b) directs that the district court "shall sentence" the defendant accordingly if it is found that he is a dangerous special offender. As the Court of Appeals stated, "this command is not tentative, the sentence imposed is effective immediately." (27a) In Footnote "4" of its petition the Government claims that the original Senate Bill provided that the District Court sentence was "not final", but because of superflousness this label was omitted from the final bill. It is submitted that this omission shows the clear intent of the Congress to make such a sentence final. This statute must be read in accordance with the language in its present form. Such language speaks in terms of a final sentence as perceived by the opinion of the Court of Appeals.

In its third reason for granting the petition herein the Government's reliance upon North Carolina v. Pearce, 395 U.S. 711 (1969) is misplaced. Although the Court in Pearce held that the Double Jeopardy Clause does not prohibit a more severe sentence being imposed upon a defendant after reconviction, this holding in Pearce is premised upon the fact that the original conviction was set aside at the defendant's request. In the present situation one is dealing with a factual background where an increased sentence is sought at the request of the Government. In fact, according to 18 U.S.C. 3576, the Government not only can appeal the sentence but can also force the defendant to appeal his entire conviction:

"The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. 18 U.S.C. 3576

The Court of Appeals' understanding of the Pearce case is both rational and founded within the language of the case itself. For the Goverment to call "untenable" the Court of Appeals' reading of Pearce shows a complete lack of comprehension of the basic tenants of Pearce.

One of the claims of the Government in its petition, is that the Court of Appeals relied primarily on Kepner v. United States, 195 U.S. 100 (1904) (P. 14). To reach such a conclusion is to read the Court of Appeals decision in simplistic terms for the holding in Kepner was only one of the factors which influenced the Court of Appeals. However, Kepner's rejection of the continuing jeopardy concept has application here since it is the respondent's position, as was the Court of Appeals, that subjecting a defendant at Government request, to an increase in punishment violates the Double Jeopardy Clause.

The Government concludes its petition by claiming that 18 U.S.C. 3576 was an Act of Congress which was "neither oppressive nor vindictive" in establishing Appellate supervision over a district court sentencing procedure. Such a statement ignores the entire tenor of 18 U.S.C. 3575 and 18 U.S.C. 3576, the sole purpose of which was to provide for increased incarceration of certain defendants.

The decision of the United States Court of Appeals for the Second Circuit is founded upon sound precedent and logic and should not be subject to review by this Court.

CONCLUSION

The Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 79-567

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE DIFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 604 F.2d 769.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a-47a) was entered on August 6, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on February 19, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of 18 U.S.C. 3576 that permits the United States to seek appellate review of a sentence imposed by a district court under 18 U.S.C. 3575 violates the Double Jeopardy Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 3575 provides in pertinent part:

> (b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. * * * In connection with the hearing, the defendant

and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

* * * * *

(e) A defendant is a special offender for purposes of this section if—

* * * * *

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction,

and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

* * * * *

For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

3. 18 U.S.C. 3576 provides:

With respect to the imposition, correction, or reduction of sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be

diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure

> of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, respondent was convicted of conducting the affairs of an enterprise through a pattern of racketeering activities and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(c) and (d) (Pet. App. 2a). Following a subsequent unrelated jury trial in the same district, respondent was convicted of damaging federal property, in violation of 18 U.S.C. 1361, unlawfully storing explosive materials, in violation of 18 U.S.C. 842(j), and conspiring to commit those offenses, in violation of 18 U.S.C. 371 (*ibid.*). He

was first sentenced on the convictions arising from the second trial and given a total of nine years' imprisonment.[1] He was subsequently sentenced under the provisions of 18 U.S.C. 3575 to two ten-year terms of imprisonment on the racketeering counts involved in the first trial, to be served concurrently with each other and with the nine-year sentence imposed at the second trial. Respondent appealed from both convictions, and the government appealed under 18 U.S.C. 3576 from the sentence imposed at the racketeering trial. The court of appeals affirmed respondent's convictions and dismissed the government's appeal (Pet. App. 1a-45a).

The evidence at the racketeering trial showed that respondent was involved in an arson-for-hire scheme in the Rochester, New York, area that was responsible for at least eight fires between 1970 and 1973 (Pet. App. 3a). The arson ring agreed with property owners to set fire to their buildings in return for a share of the insurance proceeds. Pursuant to this scheme, insurance companies were defrauded of approximately $480,000 (*ibid.*). The evidence in the second trial showed that respondent had participated in the series of bombings known as the "Columbus

---

[1] The court sentenced respondent to concurrent terms of eight years' imprisonment on the damaging federal property charge and five years' imprisonment on the conspiracy charge, to be followed by a one-year term of imprisonment on the charge of unlawful storage of dynamite (C.A. Resp. App. 9). ("C.A. Resp. App." refers to the appendix filed by the respondent in the court of appeals).

Day Bombings," which occurred on October 12, 1970, and included the bombing of the Federal Building in Rochester, New York (Pet. App. 2a, 16a n.8).

18 U.S.C. 3575 permits the government to seek an enhanced sentence of up to 25 years' imprisonment for a defendant who can be classified as a dangerous special offender as defined in 18 U.S.C. 3575(e) and (f). In order to invoke this section, the government must file a notice prior to trial of its intent to do so. If a guilty verdict is returned, a hearing is held after trial in which the court determines whether the defendant meets the statutory criteria for classification as a dangerous special offender. 18 U.S.C. 3576 provides for review of a sentence imposed under 18 U.S.C. 3575 at the instance of either the defendant or the government. The court of appeals is empowered to review "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."

On September 12, 1977, prior to respondent's first trial, the government filed a notice with the district court, pursuant to 18 U.S.C. 3575(a), alleging that respondent was a "dangerous special offender" as defined in 18 U.S.C. 3575(e)(3) and (f). The notice indicated the government's intention, in the event respondent was convicted, to seek imposition of an enhanced sentence under 18 U.S.C. 3575(b) on the racketeering counts (Pet. App. 20a). On October 31, 1977, respondent was found guilty of the charges. On March 17, 1978, the dangerous special offender

hearing was held in compliance with 18 U.S.C. 3575(b) (A. 17-32). At the hearing, the government relied upon the testimony adduced at trial and upon certain public documents that attested to other convictions of respondent for the bombings, for loansharking, and for murder (A. 27-28, 30). Respondent's counsel conceded the validity of the government's public records and offered no evidence (A. 31-32). He did, however, object to any consideration of respondent's murder conviction, which had been reversed on appeal (A. 28-29).

On April 21, 1978, the district court issued findings of fact and ruled that respondent was a dangerous special offender within the meaning of 18 U.S.C. 3575 (A. 33-34). The findings reviewed respondent's criminal history in detail and concluded that it revealed "a history of virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977" (A. 41). In addition, the court found that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the [respondent's] complete and utter disregard for the public safety. The [respondent], by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only

in that way can the public be protected from further violent and dangerous criminal conduct by the [respondent]" (A. 43). On April 28, 1978, the court sentenced respondent, pursuant to 18 U.S.C. 3575, to concurrent terms of 10 years' imprisonment on the racketeering charges, to be served concurrently with the nine-year sentence that had already been imposed on March 17, 1978, in connection with his other trial on the bombing charges (A. 45-46).

Under the authority granted by 18 U.S.C. 3576, the government appealed from the dangerous special offender sentence, claiming that the district court abused its discretion in imposing a sentence that would lead, in effect, to additional imprisonment for only one year despite its findings after the dangerous special offender hearing (Pet. App. 21a-22a). The court of appeals dismissed the appeal for lack of jurisdiction on the ground that Section 3576 violates the Double Jeopardy Clause.[2] The court found that

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[2] The concurring opinion of Judge Haight suggested that the government's appeal should have been dismissed because 18 U.S.C. 3575 and 3576 were inapplicable to respondent (Pet. App. 44a-45a). The majority of the court disagreed, finding that Section 3575 could properly have been applied to respondent (Pet. App. 23a-24a n.13). In any event, that issue is not presented here. The court of appeals held that it lacked jurisdiction to entertain the government's appeal because of the unconstitutionality of Section 3576. Until jurisdiction is established, a court cannot consider the merits of the issues presented to it for resolution. See *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951). If this Court determines that the Double Jeopardy Clause does not prohibit the court of appeals from taking jurisdiction of the government's appeal, the court of appeals may consider on remand whether the statute is applicable to respondent.

this case was indistinguishable in principle from *Kepner* v. *United States*, 195 U.S. 100 (1904) (Pet. App. 29a-30a). In addition, the court relied upon a number of statements in dicta by this Court and the courts of appeals (*id.* at 33a-36a) that suggest that "the double jeopardy clause bars an increase in the sentence imposed by the district court" (*id.* at 36a). Accordingly, the court concluded that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time 'in jeopardy of life or limb' " (Pet. App. 30a).

SUMMARY OF ARGUMENT

In this case the court of appeals has concluded that a statute expressly authorizing the government to appeal a sentence under the dangerous special offender law violates the Double Jeopardy Clause. This Court has never invalidated an Act of Congress on double jeopardy grounds, and the decision of the court of appeals significantly circumscribes the authority of Congress to legislate with respect to sentencing. The court's holding defeats the specific intent of Congress that district courts not be afforded final sentencing authority when dealing with individuals defined as dangerous special offenders under the statute. Moreover, it jeopardizes the ability of Congress to respond to one of the most widely recognized problems of our present sentencing system—the frequent and substantial disparities in sentences imposed on similarly

situated offenders—by resort to appellate review of sentences. Neither the history nor the policy of the Double Jeopardy Clause supports such an irrational restriction on legislative authority to improve the fairness and rationality of the administration of criminal justice.

A. It is by now well settled that the Double Jeopardy Clause does not generally operate as a barrier to prosecution appeals in criminal cases. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977); *United States* v. *Wilson*, 420 U.S. 332, 342 (1975). Thus, the Clause does not ordinarily confer upon a defendant the right to retain a favorable but erroneous disposition of his case by the trial court. For example, a dismissal with prejudice after verdict (*Wilson, supra*) or even during trial (*United States* v. *Scott*, 437 U.S. 82 (1978)), although a total victory for the defendant at the trial level, may be overturned on the government's appeal. Appeal is foreclosed only in that special category of cases in which the relief requested of the appellate court by the prosecution (specifically, a new trial following an acquittal) would violate the Double Jeopardy Clause. Even then, it is the relief sought, not the appeal itself, that offends the Constitution.

B. Accordingly, the statutorily authorized sentence appeal in the instant case can violate double jeopardy principles only if the initial pronouncement of sentence clothes a defendant with the same immunity from further consideration of an appropriate sen-

tence as a verdict of acquittal does with respect to further trial proceedings inquiring into his guilt or innocence. In other words, only if the pronouncement of sentence amounts to an "implied acquittal" of any greater sentence and the appeal amounts to a further "trial" does a basis exist for contending that the Double Jeopardy Clause is offended by the appeal. There is, however, no basis in either precedent or policy for making such an equation and therefore no basis for the court of appeals' conclusion that the prohibition of *Kepner* v. *United States*, 195 U.S. 100 (1904), against an appellate redetermination of guilt or innocence following an acquittal at trial governs the present case.

When a jury returns a verdict of not guilty, the Double Jeopardy Clause absolutely bars the sovereign from thereafter pursuing the same charge against the defendant. The pronouncement of sentence, however, has never carried the same quality of finality. At common law and in American practice at and after the adoption of the Constitution, a sentence could be increased at any time during the term of court in which it was imposed. Moreover, this Court has specifically held that the Double Jeopardy Clause does not preclude imposition of a higher sentence at a second trial for an offense than was imposed following the first trial (*North Carolina* v. *Pearce*, 395 U.S. 711 (1969)) or the correction of a sentence that is legally erroneous by virtue of omission of a mandatory punishment (*Bozza* v. *United States*, 330 U.S. 160 (1947)). The court of appeals' attempt

to distinguish *Pearce's* seemingly dispositive holding on the lack of nexus between double jeopardy and imposition of an increased sentence on a theory that the defendant waived his protection against an increased sentence by appealing his original conviction is untenable. It would be manifestly unfair to condition the defendant's opportunity to assert other rights upon his waiver of double jeopardy protections, and the Court has specifically rejected this waiver analysis. *Green* v. *United States*, 355 U.S. 184 (1957).

Apart from these precedents, moreover, the equation of sentencing with trial is fundamentally unsound. The embarrassment and emotional ordeal of trial is a unique burden materially different in character from the stresses associated with sentencing or with other aspects of the criminal justice process—and, a fortiori, from appellate review proceedings. And the possibility of review of a sentence does not implicate in any way the concern of the Double Jeopardy Clause to guard against the risk of conviction of an innocent person through repeated prosecutions for the same offense. It is for this reason that the Court has stressed the uniqueness of the double jeopardy bar to appeal of acquittals (*United States* v. *Scott*, *supra*, 437 U.S. at 91), that it has found conviction of a lesser offense to be an implied acquittal of the greater barring reprosecution on the greater (*Green*) while refusing to conclude that imposition of a particular sentence implicitly "acquits" the defendant of exposure to any greater sentence

(*Pearce*), and that it has prohibited a retrial after entry of an acquittal that was beyond the authority of the trial court (*Fong Foo* v. *United States*, 369 U.S. 141 (1962)) while allowing a legally improper sentence to be corrected (*Bozza*).

C. The Double Jeopardy Clause has also been said to protect individuals against multiple punishment for a single offense. We have difficulty perceiving any sense in which it could reasonably be said that an increase in respondent's sentence resulting from a statutorily authorized appeal would constitute double punishment, so long as the sentence, as increased, remains within statutory limits. Certainly, the situation would be wholly unlike *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), in which the trial court had ordered both fine and imprisonment although the statute permitted only one of those sanctions to be imposed.

It is true that, in the absence of any statutory regulation of the matter, it has come to be generally held that the power of a trial court to increase a sentence ends at the time the defendant commences service of that sentence. While dictum in *United States* v. *Benz*, 282 U.S. 304 (1931), states that this rule is constitutionally required in order to avoid multiple punishment, the basis for this conclusion is far from clear. Perhaps there would be some ground for a double punishment finding where the defendant has completed service of a sentence prior to its increase, but commencement of service is a wholly

fortuitous circumstance that has no nexus to any substantial interest of a defendant protected by the Double Jeopardy Clause.

D. This Court's double jeopardy analysis has generally taken pains to consider substance rather than form. Here, the substance is that the district courts have power to enter only tentative sentences of dangerous special offenders, but that final sentencing authority resides in the appellate courts. The procedure is thus quite similar to that upheld by this Court with regard to the determination of guilt or innocence in *Swisher* v. *Brady*, 438 U.S. 204 (1978). Were Congress to require district courts to sentence persons such as respondent to the maximum term, subject to reduction by the court of appeals on recommendation of the district court, there would be no possible foothold for a double jeopardy objection. The formal differences between such an indisputably valid scheme and the one Congress has adopted in Section 3576 do not implicate any substantial individual rights that bear upon the values served by the Double Jeopardy Clause.

E. Finally, it must be noted that the present system of sentencing has come under strong attack from responsible quarters because the unreviewable sentencing power of individual judges has produced wide disparities in sentences meted out to similarly situated offenders. Appellate review of sentencing is one obvious means of bringing needed uniformity to this aspect of the criminal justice system—a means that cannot be fully effective to achieve its ends un-

less available to the prosecution as well as the defense, since excessively lenient sentences are as much a part of the perceived inequity of the present system as excessively harsh ones. There is nothing in the history or policies of the Double Jeopardy Clause that justifies depriving the legislature of this tool for reform of the criminal justice system.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR CONGRESS FROM AUTHORIZING GOVERNMENT APPEAL OF SENTENCES

In the present case the district court, after a hearing, concluded that respondent was a dangerous special offender, as that concept is defined in 18 U.S.C. 3575, characterizing him as "a hardened habitual criminal from whom the public must be protected for as long a period as possible" (A. 43). Notwithstanding that conclusion, however, a week later the court imposed a sentence that effectively amounted to only one year's imprisonment beyond that already imposed in a separate case. The United States' statutorily authorized appeal asserted that the sentence imposed constituted an abuse of the district court's discretion. Since the court of appeals dismissed the appeal for lack of jurisdiction and did not reach the merits of this contention, it must be assumed for present purposes that the district court in fact committed legal error by abusing its sentencing discretion, and that it was legally obliged on the record

before it to impose a more severe sentence in the first instance. The question is whether the Double Jeopardy Clause bars correction of such an error by means of a statutorily authorized appeal to the court of appeals.

We argue herein that the congressional judgment to allow prosecution appeals of sentences in certain prescribed circumstances represents a soundly conceived step toward the goal of a more rational criminal justice system and that such appeals are consistent with the policies embodied in the Double Jeopardy Clause. This Court has never previously invalidated any Act of Congress on double jeopardy grounds, and this is no place to begin.

A. The Double Jeopardy Clause Is Not Addressed To Restricting Government Appeals

It is by now well settled that the Double Jeopardy Clause does not generally operate as a barrier to appeals by the prosecution in criminal cases. As the Court said in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977), "where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." In *United States* v. *Wilson*, 420 U.S. 332 (1975), the trial court dismissed the indictment on the ground of excessive pre-indictment delay after the jury had entered a guilty verdict. Noting that the Double Jeopardy Clause is "directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial" (420 U.S. at 342), the Court held the Constitution

did not bar a government appeal of that dismissal. In *United States* v. *Scott*, 437 U.S. 82 (1978), the Court held that the government could appeal such a dismissal even if it was made during trial.[3]

It is thus evident that the government's appeal of respondent's sentence cannot offend double jeopardy principles on the ground that its success would deprive respondent of the benefit (undoubtedly significant to him) of a more lenient sentence. In cases like *Wilson* and *Scott*, the defendant had won a total victory in that the trial court had terminated the case in a manner that would have allowed him to go free, yet the government was permitted to appeal the order.[4]

There is, of course, one specific category of cases in which government appeal is effectively foreclosed by the Double Jeopardy Clause—*i.e.*, those cases in which the appeal follows an acquittal and success on the appeal would require a new trial. In such cases, the relief requested would offend the principal protection of the Double Jeopardy Clause, that against successive prosecutions. See *Sanabria* v. *United*

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[3] Even acquittals are not wholly immune from prosecution appeals. In accordance with the reasoning employed by this Court, the courts of appeals have uniformly held that the government may appeal post-guilty-verdict acquittals. See, *e.g.*, *United States* v. *Rojas*, 554 F.2d 938, 941-942 (9th Cir. 1977); *United States* v. *De Garces*, 518 F.2d 1156 (2d Cir. 1975). See also *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975).

[4] Success by the government in such an appeal would in effect increase the defendant's sentence from nothing to something, yet that consideration plainly was not thought to have any bearing on the permissibility of the appeal.

States, 437 U.S. 54, 63 (1978); *United States* v. *Martin Linen Supply Co., supra.* Even in this class of cases, however, it cannot properly be said that the appeal itself offends the Double Jeopardy Clause; rather, the appeal is barred by the case or controversy requirement of Article III.

B. The Double Jeopardy Clause Does Not Clothe Sentences With Unreviewable Finality

Since it is not a prosecution appeal itself that can fall afoul of the Double Jeopardy Clause, but rather the relief requested by the appeal, it must next be considered whether a criminal sentence, once pronounced, must be accorded constitutional finality similar to that attaching to a jury's verdict of not guilty. Neither the history of sentencing practices, the pertinent holdings of this Court, nor considerations of double jeopardy policy supports such an equation.

The special rule that has evolved respecting the finality of an acquittal by the fact-finder in a criminal case reflects the fact that the prohibition against multiple trials is the " 'controlling constitutional principle' " of the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co., supra*, 430 U.S. at 569. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). Even the protection against retrials, however, is not absolute. A defendant may be retried, for example, when a mistrial is declared in his first trial for reasons of "manifest

necessity," such as a hung jury, *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), when a trial is erroneously terminated at the defendant's behest prior to verdict on grounds unrelated to guilt or innocence, *United States* v. *Scott*, 437 U.S. 82 (1978), when a conviction is reversed on appeal, *United States* v. *Ball*, 163 U.S. 662 (1896), or even when a final judgment of conviction is set aside on collateral attack, *United States* v. *Tateo*, 377 U.S. 463 (1964). But when a defendant has been acquitted by a jury on the facts, he may not be retried even if legal error was committed at the trial. *United States* v. *Ball*, *supra*.[5] This rule has been characterized as attaching "particular significance to an acquittal" (*United States* v. *Scott*, *supra*, 437 U.S. at 91), and it has been justified on the basis that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' " *Ibid.*

Thus, appeal of a sentence would seem to be a violation of double jeopardy only if the original pronouncement of sentence is to be treated in the same way as an acquittal and the appeal is to be treated as a retrial. The court of appeals apparently took

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[5] The Court has indicated that the same rule obtains with respect to the factual determination by a judge in a bench trial, where the judge acts as factfinder instead of the jury. See *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 573 n.12.

precisely this position in relying primarily on *Kepner* v. *United States*, 195 U.S. 100 (1904), which focuses on this special situation of a retrial after acquittal. *Kepner* involved an appeal taken from an acquittal in a bench trial in the courts of the Philippine Islands, which were being administered by the United States at that time.[6] The appeal in *Kepner* was not an ordinary appeal of a legal ruling made by the trial judge; rather, it involved what was essentially a trial de novo on the facts in the appellate court. See *United States* v. *Wilson*, *supra*, 420 U.S. at 346. This Court, noting that the primary protection of double jeopardy is "against being again tried for the same offense" (195 U.S. at 130), held that the government could not "appeal" Kepner's acquittal because to do so would be to "try him again on the merits * * * in an appellate court." 195 U.S. at 133.

The court of appeals held that the rationale of *Kepner* applies equally to a government appeal of a sentence under 18 U.S.C. 3576 and that the Double Jeopardy Clause bars such an appeal. The court stated (Pet. App. 30a):

> We cannot perceive, however, how a defendant who, after being sentenced to several years' im-

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[6] *Kepner* involved a construction of an Act of Congress applicable to the Philippines, rather than the Double Jeopardy Clause, and this Court has held that decisions interpreting the double jeopardy provisions of that Act are not to be treated as conclusive determinations of constitutional law. *Green* v. *United States*, 355 U.S. 184, 197 & n.16 (1957). However, *Kepner* has been treated as having correctly stated the relevant double jeopardy principles. *United States* v. *Wilson*, *supra*, 420 U.S. at 346 n.15.

> prisonment by a district court, might be subject to imposition of a sentence of death upon a governmental appeal, would be any less placed twice in jeopardy of life or limb than was the defendant in *Kepner*, who, after acquittal in the court of first instance, was found guilty and sentenced to imprisonment for slightly less than two years upon appeal by the government. * * * Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time "in jeopardy of life or limb."

Essentially, the court of appeals' theory is that the imposition of a sentence should be treated, for double jeopardy finality purposes, as an "implied acquittal" of a greater sentence. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 634-635 (1965).

But this theory does not withstand analysis. First, the court's reliance on *Kepner* ignores *Kepner's* primary focus on the undesirability of a second *trial.* Second, the court's simple equation of the imposition of a sentence with an acquittal ignores the "particular significance" that is attached to an acquittal and the fundamental distinctions, with respect to double jeopardy policies, between a sentence and an acquittal on the issue of guilt.

1. ***Both English Common Law and American Practice Have Allowed Increase of a Sentence After it Has Been Pronounced***

When a jury returns a verdict of not guilty, the defendant is absolutely protected by the Double Jeop-

ardy Clause from any effort to overturn that verdict or to pursue the same charge in a different proceeding. From the origins of double jeopardy at common law until the present day, however, the pronouncement of sentence has never carried the same type of finality. The common law writs of *autrefois acquit* and *autrefois convict* protected defendants against retrial on the same charge, but not specifically against resentencing. See *United States* v. *Wilson*, *supra*, 420 U.S. at 340; 4 W. Blackstone, *Commentaries*, Ch. XXVI, *335-336 (Tucker ed. 1803).[7]

Of course English common law initially did not have to grapple with the specific question of the limitations on the state's power to increase a sentence, because virtually all felonies (to which double jeopardy principles were originally limited) were punishable by death or deportation. See Comment, *Statutory Implementation of Double Jeopardy Clause*, 65 Yale L.J. 339, 342-343 (1956); J. Sigler, *Double Jeopardy* 20 (1969). But as sentences of imprison-

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[7] The writ of *autrefois convict*, of course, protected a defendant against double punishment to the extent that imposition of a second sentence was precluded by the bar against a second trial. As Blackstone points out, 4 W. Blackstone, *supra*, at *336, this plea was especially useful to a defendant who sought the "benefit of clergy" in arrest of judgment. A defendant who was convicted in the Crown's courts could, once in a lifetime, by demonstrating his ability to read, exercise his privilege to be turned over to the ecclesiastical courts for punishment. The plea of *autrefois convict* protected this right by insulating the lenient sentence that was usually given by the ecclesiastical courts from further action by the Crown. See also Black's Law Dictionary 144 (5th ed. 1979); M. Friedland, *Double Jeopardy* 326-335 (1969).

ment became more common, the practice was established in the English courts of permitting the trial court to increase a sentence, without a retrial, during the same term of court in which the sentence was originally pronounced. See 1 *Archbold's Criminal Procedure* 689-690 (Waterman's 7th Am. ed. 1860). This practice was not thought to violate double jeopardy principles. Because the system gave the courts power over a judgment until the end of the term in which it was issued, the original sentence was not treated as final until the term had ended. See generally *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166-167 (1873); *id.* at 192-194 (Clifford, J., dissenting).[8]

The Double Jeopardy Clause of the Constitution was drafted with the common law double jeopardy protections in mind. See *United States* v. *Wilson*, *supra*, 420 U.S. at 341-342; *Green* v. *United States*, 355 U.S. 184, 200-201 (1957) (Frankfurter, J., dissenting). Nothing in the history of the adoption of the Clause suggests that its purposes included protecting the finality of sentences, let alone any intent to prohibit the settled practice under which trial courts could modify or increase sentences during a single term of court. And early American cases con-

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[8] Coke described this power as follows: "[D]uring the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct." 2 *Coke Upon Littleton*, Lib. 3 Cap. 7, Sec. 438 [260.a.] (Day's ed. 1812).

tinued to permit this practice. See *Jobe* v. *State*, 38 Ga. 235, 236 (1859). See also *State* v. *Harrison*, 18 Tenn. (10 Yerger) 542, 546 (1837). In *Commonwealth* v. *Weymouth*, 84 Mass. 144 (1861), the court upheld the increase of a defendant's sentence from two to three and a half years' imprisonment on the day after sentence had been pronounced, noting the common law rule that sentences could be increased during the same term. Then, although there apparently was no basis for it in common law or prior American practice, the *Weymouth* court went on to remark that it might have reached a different result if execution of the sentence had already begun. *Id.* at 146-147.

The rule suggested by *Weymouth* has become the general practice in the federal courts, and it appears to this day to be well settled that the sentencing judge is permitted to recall the defendant and increase his sentence as long as he has not begun to serve the sentence. See, *e.g.*, *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Williams* v. *United States*, 422 F.2d 1318 (5th Cir. 1970); *Vincent* v. *United States*, 337 F.2d 891, 894 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965); *United States* v. *Byars*, 290 F.2d 515, 516 (6th Cir.), cert. denied, 368 U.S. 905 (1961).[9] Accordingly, in contrast to

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[9] It has been contended that the other aspect of the customary federal practice, *i.e.*, that the trial judge may not in-

acquittals, the practice in this country has never protected any defendant who has had what appears to be a final sentence pronounced upon him from the unhappy fate of having that sentence later increased.

While there is little American experience with appellate review of sentences, this history demonstrates that the common law has never ascribed such finality to a sentence as would prevent a legislature from authorizing its appeal by the prosecution. Indeed, several countries that trace their legal systems to the English common law permit such appeals. See Canada: Can. Rev. Stat. §§ 605(1)(b) and 748(b)(ii) (*Martin's Annual Criminal Code* (1979)); Australia (New South Wales): Criminal Appeal Act of 1912, as amended in 1924, 3 Pub. Acts N.S.W. § 5D (1959); New Zealand: Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N.Z. § 383(a) (1979). As one commentator has noted, a government "appeal from sentence has not generally been categorized as a violation of the rules against double jeopardy, which are less concerned about the extent of punishment than about the determination of guilt or innocence." M. Friedland, *Double Jeopardy* 290 (1969).

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crease a sentence once service has begun (see, *e.g.*, *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969)), is required by the constitutional guarantee against multiple punishment. This contention is discussed in Part C, *infra*, pages 42-47.

2. *The Holdings of This Court Confirm that Sentences Do Not Have Finality Comparable to Acquittals for Double Jeopardy Purposes*

The decisions of this Court in the sentencing area have also established that a sentence does not have qualities of constitutional finality comparable to an acquittal. In *Bozza* v. *United States*, 330 U.S. 160 (1947), the Court held that the trial judge had the power to recall a defendant and increase his sentence when the sentence first imposed was legally erroneous because it had omitted the mandatory fine provided by statute. And in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court made clear that a defendant has no right of finality even in a valid sentence entered in compliance with the statute. *Pearce* held that a defendant who is retried following a successful appeal of a conviction may, without offense to double jeopardy principles, be sentenced on retrial to a longer sentence than had been imposed at the first trial.[10] If a special rule of finality applied to the imposition of a sentence, the original sentence imposed should have served as a ceiling on any sentence that could be imposed on retrial. Accordingly, *Pearce* indicates that the Double Jeopardy Clause does not protect any finality interest in a sentence against a statutorily authorized appeal.

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[10] The rule of *Pearce* permitting an increase of sentence on retrial is a " 'well-established part of our constitutional jurisprudence.' " *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24 (1973).

It is true, of course, that *Pearce* did not deal with an appeal, but rather with "the imposition of wholly new sentences after wholly new trials" (395 U.S. at 722), but the Court itself noted that this consideration is only a "conceptual nicety" (*ibid.*). We submit that, if anything, the differences between the present situation and that in *Pearce* make an even stronger case for permitting appeals of sentences. In the appeal context, review is had to rectify an erroneous sentence; in *Pearce*, there is no indication that the first sentence was in any respect defective. Moreover, in this case Congress has expressly provided that dangerous special offender sentences be subject to review, so respondent could have no expectation that the sentence is final until appeal has been exhausted. In the retrial situation, by contrast, it is arguable that the defendant has an expectation of finality in the sentence imposed and that an appeal of his conviction, which does not call the sentence into question, reopens only the question of guilt or innocence, not sentence, on retrial. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963). The Court, of course, has rejected this latter approach in *Pearce* in holding that "the slate has been wiped clean" (395 U.S. at 721) by the reversal of the first conviction.

The court of appeals perforce acknowledged that, in light of *Pearce*, a sentence may be subject to later increase without violating the Double Jeopardy Clause. However, the court sought to limit *Pearce* to its particular factual context of a retrial after a

conviction has been set aside on the defendant's appeal. Specifically, the court of appeals asserted that the defendant in *Pearce* was subject to a higher sentence on retrial only because of his "voluntary choice" to appeal his conviction. In a case like the instant one, the court reasoned, where the defendant takes no affirmative action,[11] the Double Jeopardy Clause bars the increase of a sentence on appeal (Pet. App. 36a-38a).[12]

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[11] Under the theory of the court of appeals, such affirmative action is not restricted to taking an appeal, but would also apparently include contesting at the district court level the determination that the defendant is a dangerous special offender (Pet. App. 26a n.17). We are hard pressed to understand why the government could take an appeal challenging the failure to classify a defendant as a dangerous special offender (which appeal, if successful, would result in an increased sentence on remand) but cannot appeal claiming abuse of discretion or other error in the selection of a sentence for one properly classified as a dangerous special offender.

[12] Several state statutes permit an increase of sentence by an appellate court if the defendant appeals the sentence. See Pet. App. 24a n.15; Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. Crim. L. & Criminology 19, 20 n.8 (1978). Although it is arguable that the threat of an increase in sentence upon a defendant's appeal violates a due process consideration identified in *Pearce*, see 395 U.S. at 723-726, by exerting a chilling effect on the defendant's decision whether to appeal, the constitutionality of this procedure has been upheld by lower courts. See *Robinson* v. *Warden*, 455 F.2d 1272 (4th Cir. 1972); *Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971); *Hicks* v. *Commonwealth*, 345 Mass. 89, 185 N.E.2d 739 (1962), cert. denied, 374 U.S. 839 (1963); *Kohlfuss* v. *Warden of Connecticut State Prison*, 149 Conn. 692, 183 A.2d 626, cert. denied, 371

The distinction of *Pearce* suggested by the court of appeals is quite unsatisfactory, and its rationale has in any event been rejected by this Court. Essentially, the court of appeals found that a defendant has an absolute constitutional right that the sentence originally imposed upon him not be increased, but that the right is lost if the defendant appeals his conviction on the ground that error was committed at trial. The unfairness of such a rule was well expressed by Justice Holmes: "it cannot be imagined that the law would deny to a prisoner the correction

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U.S. 928 (1962). And post-*Pearce* decisions of this Court indicate that such a procedure does not violate due process because there is no danger of vindictiveness. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *Colten* v. *Kentucky*, 407 U.S. 104 (1972). See also Dunsky, *supra*, at 37-38. The court of appeals suggested that it might find such a statute to be constitutional but stated that these decisions were completely irrelevant to the question of an appeal instigated by the prosecution (Pet. App. 38a n.25).

18 U.S.C. 3576 does not implicate due process vindictiveness concerns. It specifically provides that "a sentence may be made more severe only on review of the sentence taken by the United States." And the time for the United States to take an appeal expires prior to the time for a defendant to take an appeal. Accordingly, the statutory scheme guards against the danger that a defendant's sentence will be increased in retaliation for the exercise of his right to appeal. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 94, 166-167 (1969). One commentator who strongly criticized on due process grounds the practice of increasing sentences upon retrial, a criticism adopted by the Court in *Pearce*, saw no constitutional objection to appeal of a sentence by the prosecution. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 613, 620-621 (1965).

of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Kepner* v. *United States, supra,* 195 U.S. at 135 (Holmes, J., dissenting).

The court of appeals acknowledged that this Court, in *Green* v. *United States, supra,* had accepted Justice Holmes' position and rejected the notion that a defendant could "waive" his constitutional rights by appealing his conviction; but the court stated that *Pearce* involved not a "waiver," but an exercise of the defendant's "voluntary choice" as discussed in *United States* v. *Scott, supra* (Pet. App. 37a-38a). This contention completely misunderstands the Court's position in *Green* as well as its rationale in *Scott.* The Court stated in *Green* that "[w]hen a man has been convicted * * * it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy * * * in order to secure a reversal of an erroneous conviction * * *. In short, he has no meaningful choice." 355 U.S. at 191-192. The same is true, of course, in the sentencing context of *Pearce.* A defendant's challenge to the validity of his indictment or the fairness of his trial certainly does not signal a willingness to place the length of his sentence in issue.[13] In *Pearce,* as in *Green,* the de-

[13] Indeed, even when the defendant takes a voluntary action that appears to signal a waiver of a double jeopardy claim, such as moving for a new trial, the Court has been reluctant to find such a waiver. See *Burks* v. *United States,* 437 U.S. 1, 17-18 (1978). See also *Menna* v. *New York,* 423 U.S. 61 (1975).

fendant had no meaningful choice whether to appeal, and he cannot be considered to have waived any right to limit his punishment to his original sentence. See also *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976) (harsher sentence may be imposed at second tier of criminal system even though defendant must seek trial at second tier in order to obtain trial by jury). Rather, *Pearce* permits a sentence increase precisely because the defendant has no constitutional right to retain his original sentence once the "slate has been wiped clean." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721. The "slate is wiped clean" when the sentence is lawfully set aside pursuant to an established procedure, whether by a reversal of the conviction on appeal as in *Pearce* or by an appeal of sentence pursuant to a statute as in this case.[14]

3. *The Double Jeopardy Policies That Bar Reprosecution After An Acquittal Do Not Support Prohibition Of Sentence Appeals*

The classic description of the reasons for the bar against successive prosecutions was set forth in *Green* v. *United States*, *supra*, 355 U.S. at 187-188:

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[14] The court of appeals' reliance on *United States* v. *Scott*, *supra*, is misplaced. In *Scott*, the defendant did indeed exercise a voluntary choice, making a strategic decision to terminate the trial before its completion. The defendant could have chosen to make his motion after the completion of the trial, thus avoiding the necessity for a retrial. Accordingly, the Court held that the defendant was in no position to complain about a double jeopardy problem that he could have avoided. 437 U.S. at 98-101. In *Pearce*, of course, the defendant could not have avoided the need for a retrial except by foregoing his right to have an invalid conviction set aside.

> The underlying idea * * * is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The appeal of a sentence by the prosecution does not sufficiently implicate these considerations to justify equating it with a successive prosecution, because the appeal does not involve a retrial or anything approaching the ordeal of a trial. Under Section 3576, an appeal is taken on the record made in the sentencing court, and the appellate court makes a determination whether the sentence originally pronounced should be accepted or modified. Because the defendant is aware of the appeal provision, he has no expectation of finality in the sentence until the appeal is exhausted. At most, appeal prolongs the period of anxiety over what his final sentence is to be, but only for a finite time period as provided by statute. In this regard, appeal of a sentence is no more of an "ordeal" than any government appeal under 18 U.S.C. 3731 of a trial court determination that, if undisturbed, would resolve the case in the defendant's favor. See *United States* v. *Wilson*, *supra*. Indeed, the anxiety of the defendant is usually less in the sentencing context, because he already knows the

result of the fundamental inquiry into whether he is innocent or guilty.

Although the government's appeal in this case rests on the findings of the district court and does not request a second sentencing hearing, it is apparent that even such a second proceeding would not implicate the concerns of the Double Jeopardy Clause in the manner that a retrial does. At a sentencing hearing, the defendant does not endure any anxiety over whether he will be stigmatized by a conviction, and he certainly is subject to no risk of being convicted although innocent. Moreover, the sentencing proceedings are brief and informal; while the outcome is no doubt important to the defendant, he does not typically undergo anything comparable to the expense, embarrassment and ordeal associated with a trial. Finally, the sentence determination itself is quite different from an acquittal at trial. An acquittal represents a factual determination by the fact-finder, ordinarily the jury, that the defendant is not guilty. It has been defined by the Court as " 'a resolution, correct or not, of some or all of the factual elements of the offense charged.' " *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571. See also *United States* v. *Scott*, *supra*, 437 U.S. at 82; *Sanabria* v. *United States*, *supra*, 437 U.S. at 71. A sentence is characteristically determined primarily on the basis of information developed outside the courtroom, such as presentence reports. It is purely

a judicial determination, and much that goes into it is the result of inquiries that are essential informal and non-adversarial in nature.

This Court has recognized these important differences between sentences and acquittals, and its decisions have consistently refused to equate the two for double jeopardy purposes. This distinction is most evident in a comparison of the cases dealing with the scope of retrial and resentencing after a conviction has been reversed. In *Stroud* v. *United States*, 251 U.S. 15 (1919), the Court held that a defendant's sentence at one trial did not act as a ceiling on the sentence that could be imposed at a retrial. The defendant was tried and convicted three times of first degree murder, the first two convictions having been reversed on appeal. At the first trial he was sentenced to death, but at the second trial, upon a recommendation by the jury, he was sentenced to life imprisonment. The Court ruled that his death sentence at the third trial did not violate the Double Jeopardy Clause.

In *Green* v. *United States*, *supra*, a defendant was convicted of second degree murder, although the jury could have convicted him of first degree murder. After his conviction was reversed on his appeal, he was retried and convicted of first degree murder. The Court held that this conviction violated the Double Jeopardy Clause on the theory that the jury's verdict at the first trial was an "implicit acquittal"

of first degree murder. 355 U.S. at 190-191. The dissent argued that the effect of the second conviction, at a retrial that was clearly permissible, was no different from the situation where the defendant's sentence was increased at retrial, which was permissible under *Stroud*. 355 U.S. at 213 (Frankfurter, J., dissenting). The Court, however, rejected this argument and explicitly distinguished *Stroud* on the ground that the defendant there had been convicted of the same offense in both trials. 355 U.S. at 195 n.15.

Any uncertainty over the effect of *Green* on sentencing was laid to rest by *North Carolina* v. *Pearce*, *supra*, where the Court explicitly held that the Double Jeopardy Clause does not bar the imposition of a sentence on retrial higher than that imposed at an earlier trial, as long as credit is given for time already served.[15] Once a retrial is permissible, the Court reasoned, double jeopardy does not prohibit the imposition of any sentence that can otherwise lawfully be imposed. 395 U.S. at 721. The position that the increased sentence in *Pearce* was indistinguishable from the conviction of a higher degree of-

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[15] After *Green*, there had been some confusion in state courts over whether the implicit acquittal theory of *Green* should be extended to the increase of a sentence. Compare *Hicks* v. *Commonwealth*, *supra*, and *Kohlfuss* v. *Warden of Connecticut State Prison*, *supra* (increase of sentence does not violate double jeopardy), with *People* v. *Henderson*, 35 Cal. Rptr. 77, 386 P.2d 677, 685-686 (1963) (rationale of *Stroud* vitiated by *Green*).

fense in *Green*, on the theory that a particular sentence is an implicit acquittal of a higher sentence, was clearly presented to and rejected by the Court. See 395 U.S. at 727-728 (Douglas, J., concurring); *id.* at 746 (Harlan, J., concurring in part and dissenting in part). Recognizing the fundamental distinction between a sentence and an acquittal, the Court held that *Green* was not applicable because it "was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted.*" 395 U.S. at 720 n.16 (emphasis in original).

The Court has also recognized a significant difference between a sentence and an acquittal in another context. In *Bozza* v. *United States*, *supra*, the district court had originally sentenced the defendant to imprisonment but omitted the mandatory fine provided by statute. This sentence was not treated as final for double jeopardy purposes, and the court's subsequent resentencing of the defendant to the same term of imprisonment and the mandatory fine was upheld. This Court explained that no double jeopardy problem was presented by the increased sentence because the trial court had no authority to impose the original sentence in the form it did. 330 U.S. at 167. See also Fed. R. Crim. P. 35.

When the Court was presented with an analogous situation in the context of an acquittal, however, it reached precisely the opposite result. In *Fong Foo* v. *United States*, 369 U.S. 141 (1962), the trial judge

directed the jury to return a verdict of acquittal after the prosecution had barely begun to present its case. The court of appeals concluded that the trial judge had no power to direct the judgment in question, and this Court did not dispute that conclusion. See 369 U.S. at 143. See also *United States* v. *Scott, supra*, 437 U.S. at 90; *Sanabria* v. *United States, supra*, 437 U.S. at 64, 78; *United States* v. *Martin Linen Supply Co., supra*, 430 U.S. at 571. Nonetheless, because a final judgment of acquittal had been entered, the Court concluded that retrial of the defendant would violate the Double Jeopardy Clause. The acquittal in *Fong Foo* was entitled to a greater degree of finality than the sentence in *Bozza* because of the strong policy against multiple trials, which is implicated in the acquittal, but not the sentencing, context. See *United States* v. *Wilson, supra*, 420 U.S. at 347-348.

The recognition that acquittals require a greater degree of finality than do sentences is highlighted by examination of the different types of sentences that exist in our criminal justice system. It is clear that the Double Jeopardy Clause does not give the defendant the right to know at any specific time what his exact punishment is to be. There are many types of criminal sanctions established by Congress under which the defendant is unaware of the exact extent of his punishment for significant periods of time, or even for life, that are not considered to be in violation of the Double Jeopardy Clause.

Under 18 U.S.C. 3561, a defendant may be placed on probation instead of being imprisoned. He is subject, however, to revocation of his probation and imposition of imprisonment, obviously an increase in the severity of his sentence; yet the Double Jeopardy Clause does not protect him against this increase. See, *e.g.*, *Thomas* v. *United States*, 327 F.2d 795 (10th Cir.), cert. denied, 377 U.S. 1000 (1964). In fact, if the defendant is placed on probation after trial, and imposition of sentence is suspended, he may be sentenced to any sentence that could originally have been imposed if his probation is revoked.[16] For example, if a defendant is originally subject to a 10-year term of imprisonment and is put on probation for five years with imposition of sentence suspended, he may be sentenced to a full 10-year imprisonment term if he violates his probation one week before it expires. See, *e.g.*, *Dunn* v. *United States*, 561 F.2d 259 (D.C. Cir. 1977). Also, the sentences of certain drug offenders are composed partly of special parole terms under 21 U.S.C. 841. If parole is violated, the offender may be imprisoned consistent with the Double Jeopardy Clause. *United States* v. *Kuck*, 573 F.2d 25 (10th Cir. 1978). Thus these drug offenders must endure significant periods in which they are uncertain whether they will go to

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[16] It is clear that this sentence constitutes punishment for the original offense and not for the conduct that violated the conditions of probation.

prison for an offense of which they were convicted a long time ago; in fact, because the length of special parole terms is not limited by the statute, a defendant may be subject to this uncertainty for life. See *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468-469 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977).[17]

These other criminal sanctions, of course, do not involve the increase of a final sentence. When these conditional sentences are first imposed, the defendant is aware that an imprisonment term may later be imposed. But the situation here is no different. It is Congress that determines the finality of a sentence, and, Congress having spoken, the defendant here is similarly aware that a dangerous special offender sentence is subject to increase on appeal. The defendant's legitimate expectations are not defeated if his sentence is increased on appeal any more than if his parole or probation is revoked.

In sum, the common law tradition and this Court's decisions in *North Carolina* v. *Pearce*, *supra*, and *Bozza* v. *United States*, *supra*, indicate that the Double Jeopardy Clause does not require that a sentence be given a degree of finality that would prevent the sentence from later being increased. And it is apparent, because of the critical differences between a sentence and an acquittal and because of

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[17] Other examples of effective sentence increases are forfeiture of good time credits, 18 U.S.C. 4165, and revocation of parole, 18 U.S.C. 4214.

the primary focus of the double jeopardy protection on discouraging retrials, that *Kepner* and other cases dealing with acquittals do not suggest a contrary result.

C. Increase of A Sentence On Appeal Is Not An Unconstitutional Multiple Punishment

The court of appeals found (Pet. App. 33a) that increase of a sentence on appeal under 18 U.S.C. 3576 constitutes "multiple punishment" in violation of the Double Jeopardy Clause. Because the statute clearly is designed to have the court of appeals consider what is the appropriate single sentence for the offense, it is difficult to understand how 18 U.S.C. 3576 can reasonably be characterized as authorizing the imposition of a double punishment or two distinct sentences for a single offense. The court's strange conclusion is a result of extending to the case of an appeal this Court's dictum in *United States* v. *Benz*, 282 U.S. 304, 307 (1931), which states that the federal practice of barring an increase in sentence by the trial court after service of the sentence has commenced is required by the constitutional bar against double punishment. There is no sound basis for that dictum, however, and it is unjustified to give it any effect today, much less extend its application to statutorily authorized appeals as the court of appeals did here.

The issue in *Benz* was whether the trial judge had the power to *reduce* a defendant's sentence after service of the sentence had begun, and the Court

found that it did have such power. The Court went on, however, to state in dictum that the trial judge could not increase the sentence after service had begun without imposing double punishment in violation of the Double Jeopardy Clause. 282 U.S. at 307. On its face, *Benz* suggests a peculiar constitutional rule. It is not apparent why the defendant's sentence should be subject to increase by the trial judge, after it has been to all appearances finally imposed, so long as he has not begun to serve it, yet the Constitution should intervene to prohibit such increase when the defendant begins service of his sentence. The implication of the rule on the facts of this case is that, although respondent's 10-year concurrent sentence may not be increased, respondent's sentence would have been subject to increase if the district court had given him the functional equivalent—a one-year sentence to be served consecutive to his other sentences. *Benz* itself suggests no justification for this rule; rather, it is presented as settled law. Thus, to understand the *Benz* dictum, it is necessary to examine its source, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Lange*, the trial court had erroneously imposed a sentence of one year's imprisonment *and* a fine when the maximum authorized sentence was one year's imprisonment *or* a fine. After Lange had paid the fine and served five days of his sentence, the court became apprised of its mistake and resentenced him to one year's imprisonment from that date. 85 U.S. (18 Wall.) at 164, 175. This Court held that

once Lange had paid the fine (which, having been paid into the Treasury, could not be refunded) and thus "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. The trial court's attempt to resentence him imposed a second sentence upon him after the service of one sentence, the fine, had been completed.

The Court was also troubled by the fact that the trial court gave no credit for time served on the original sentence, which meant that Lange would have to serve what amounted to two terms, one of one year and one of five days, the total exceeding that authorized by the statute. Noting that the defendant had already served five days of his sentence, the Court asked: "can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence." 85 U.S. at 175 (emphasis in original). This specific language was quoted in *Benz* in support of its dictum. 282 U.S. at 309. But it is apparent that the circumstance that suggested to the Court in *Ex parte Lange* that a sentence increase after commencement of service would constitute double punishment in that case is not susceptible of general application. Clearly, a court has the power to give credit for time already served on a charge; indeed, when sentencing a defendant on retrial, the Constitution requires that such credit be given. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-719. Yet

Benz suggests no other basis for its constitutional dictum. Thus it seems clear that as long as credit is given for time already served, there is no basis for ascribing any constitutional significance to the commencement of service of sentence in establishing the sentence's finality. To the extent that increase of a sentence can arguably be said to implicate multiple punishment concerns at all, it is only in the specific context that existed in *Lange*, where the defendant has fully completed service of his sentence or where the increased sentence exceeds the statutory maximum.

In sum, we can perceive no basis for the dictum in *Benz* that the Constitution guarantees the finality of a defendant's sentence from the time service commences. In addition, however, it is apparent that the court of appeals' decision extends that dictum to a situation not contemplated by the *Benz* Court. In the absence of any legitimate authorization to the contrary, when a defendant begins to serve his sentence, he likely perceives the amount of that sentence as finally determined. Thus there is at least a logical policy rationale, even if it is not a constitutional requirement, for prohibiting the trial judge from thereafter increasing the sentence. Here, however, Congress has specifically provided that the sentence initially imposed upon a dangerous special offender is subject to appeal. Thus the defendant has no expectation of finality in the original sentence. It is certainly open to question whether the *Benz* Court would have viewed such a congressional decision to be barred by the Double Jeopardy Clause. See Dunsky, *The Constitutionality of Increasing Sentences*

on Appellate Review, 69 J. Crim. L. & Criminology 19, 32 (1978); S. Rep. No. 91-617, *supra*, at 97.[18] Indeed, although the Supreme Court has never been faced with the issue, during the brief time the appellate courts in this country were empowered to impose sentence it was apparently understood that they were empowered to increase a sentence of the district court that was deemed too lenient. See *Bates* v. *United States*, 10 F. 92, 96 (C.C.N.D. Ill. 1881).[19]

The multiple punishment guarantee that has evolved in the holdings of this Court, apart from the *Benz* dictum, clearly is not involved in this case. That guarantee concerns the amount of punishment that lawfully can be imposed on a defendant. As in *Ex Parte Lange*, a defendant may not receive a higher sentence than that authorized by the legislature. Application of this guarantee in a given case can be determined only by reference to the punishment authorized by the legislature. *Whalen* v. *United States*,

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[18] Similarly, the other dicta cited by the court of appeals, in *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900), a case upholding imposition of a longer sentence when the first was vacated, and *Reid* v. *Covert*, 354 U.S. 1, 37 n.68 (1957), a case that did not involve the Double Jeopardy Clause, were expressed in cases where the Court clearly was not considering the situation of statutorily authorized sentence appeal.

[19] Under the Act of March 3, 1879, ch. 176, Section 3, 20 Stat. 354, the federal circuit courts were given the power "in case of an affirmance of the judgment of the district court to pronounce final sentence and to award execution thereon." That Act was supplanted by the Act of March 3, 1891, ch. 517, 26 Stat. 826. See *United States* v. *Rosenberg*, 195 F. 2d 583, 604 n.25 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952); 41 U. Cin. L. Rev. 195, 196-197 (1972).

No. 78-5471 (April 16, 1980), slip op. 3-4. See also *id.* at 2 (Blackmun, J., concurring); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Clearly, no double jeopardy problem would have been presented in *Ex Parte Lange* if Congress had established that the offense was punishable by fine *and* imprisonment, even though those are multiple punishments. See *Whalen* v. *United States, supra*, slip op. 4.[20] There is no question what punishment was authorized by Congress under 18 U.S.C. 3575 and 18 U.S.C. 3576, or that Congress had the power to establish that punishment. Accordingly, 18 U.S.C. 3576 does not violate the guarantee against multiple punishment that is enunciated in *Ex parte Lange.*

D. The Double Jeopardy Clause Does Not Prohibit A Procedure That Permits Entry Of A Tentative Sentence By One Body With The Authority To Impose A Final Sentence Residing In A Second Body

1. *This Court has Recognized that the Legislature May Establish a Two-Stage Procedure for Reaching a Final Determination in a Criminal Case*

The scheme of review set up under 18 U.S.C. 3576 essentially establishes a two-stage sentencing procedure; a tentative sentence is entered by the district

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[20] Indeed, it is not entirely clear why the Court in *Ex parte Lange* rested its decision on double jeopardy grounds, since the same result was compelled by the statute under which the defendant was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would appear that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by statute. Cf. *Whalen* v. *United States, supra*, slip op. 5 n.4.

court that becomes final either upon action by the court of appeals if one party decides to appeal or upon expiration of the time for appeal.[21] Two-stage criminal proceedings are not uncommon, and this Court has upheld a state procedure that requires a defendant to go through two hearings in order to obtain a jury trial. *Ludwig* v. *Massachusetts, supra.* See also *Colten* v. *Kentucky,* 407 U.S. 104 (1972). Indeed, this Court has recently ruled that a two-stage trial and sentencing scheme somewhat analogous to 18 U.S.C. 3576 does not violate the Double Jeopardy Clause.

In *Swisher* v. *Brady,* 438 U.S. 204 (1978), the Court considered a Maryland system that empowers a master to hear juvenile cases. The master submits proposed findings of fact, conclusions of law and recommendations to the juvenile court judge, who may adopt them without further proceedings or may modify or reject them. Either the juvenile or the

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[21] Is is clear that Congress contemplated that a sentence under 18 U.S.C. 3575 not be treated as final until the right to appeal has been exhausted. The original bill introduced in the Senate specified that the sentence shall not "be considered final until after the final disposition of any such review taken with respect to such sentence or until the expiration of the period during which any such review may be taken." S.30, 91st Cong., 1st Sess., § 3577 (1969). *Measures Relating to Organized Crime: Hearings on S.30 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary,* 91st Cong., 1st Sess. 28-29 (1969). Congress, however, was advised that this language was unnecessary to preserve the statute's constitutionality, and it was omitted from the statute. See *id.* at 196 n.18; S. Rep. No. 91-617, *supra,* at 98. See also 65 Cornell L. Rev. 715, 730 (1980).

state may file exceptions to the master's findings, however, in which case the judge holds a hearing on the record that was developed before the master.[22] No new evidence may be introduced except with the consent of both parties. This Court rejected the argument that the Double Jeopardy Clause is violated under this scheme by the possibility of sentence increase or conviction following the filing of exceptions by the government. The Court held that the Maryland procedure did not require the accused to stand trial a second time; rather, under the Maryland system "an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215.

Like the Maryland system, 18 U.S.C. 3576 does not subject a defendant to a second trial. The "hearing" held on appeal is on the record of the sentencing court, and the government has no "second crack" at producing evidence. See 438 U.S. at 216; *Burks* v. *United States*, 437 U.S. 1, 11 (1978). The statute simply sets up a two-stage proceeding in which a final sentence is not imposed until appellate review has been completed. One difference between the schemes is that under 18 U.S.C. 3576 the first stage of the proceeding involves district courts rather than masters. But this difference is of no consequence. District courts have the power to enter some final

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[22] The juvenile may elect a trial de novo if he files exceptions. The government, however, may request only a hearing on the record.

orders, but they do not have the power to impose final dangerous special offender sentences except subject to appeal. Because the defendant is on notice from the outset that his sentence is subject to appellate review, the review procedure causes none of the emotional distress that the Double Jeopardy Clause guards against, such as is often associated with a second trial following a mistrial. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. 28, 38 (1978).

A significant difference between the two schemes is that the Maryland procedure empowers the judge to make his own independent findings, while review under 18 U.S.C. 3576 is much more limited in scope. The court of appeals may increase the sentence only if the district court abused its discretion, employed unlawful procedures or made clearly erroneous findings. Thus the court of appeals is simply empowered to correct a legal error made by the district court. Although the error may not be as egregious as that in *Bozza* v. *United States*, *supra*, what the Court said there is equally applicable here: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." 330 U.S. at 166-167. The Constitution similarly does not require that a wrong move by the judge result in an unduly lenient sentence. Under the procedure involved in *Swisher*, the judge need not find legal error on the part of the master; he is free to make a de novo determination of factual matters relating to guilt or innocence based upon the

record. Surely, if this method of determining guilt or innocence is consistent with double jeopardy, the limited appellate review of sentence authorized by 18 U.S.C. 3576 is constitutional.

The conclusion that the Double Jeopardy Clause does not bar a statutorily authorized sentence appeal is highlighted by examining an analogous situation. It is clear that there is no constitutional bar to the portion of 18 U.S.C. 3576 providing for a reduction of sentence upon appeal by the defendant. If the court of appeals reduced a sentence on such an appeal on the ground that the district court had committed error in imposing its sentence, it could not be seriously contended that the Double Jeopardy Clause would bar review and reversal by this Court of the decision of the court of appeals reducing the sentence. Any such contention is foreclosed by this Court's decision in *Forman* v. *United States*, 361 U.S. 416, 426 (1960), where the Court stated that a petition for a writ of certiorari clearly could be taken from a decision by the court of appeals reversing a conviction and directing the entry of a judgment of acquittal.

The only difference between this case and the hypothetical appeal described above is that the sentence from which the government seeks to appeal is imposed by the court of appeals in one case and by the district court in the other case. At first blush, this distinction may seem to be of some significance, but that is only because it is commonly recognized that

a decision by the court of appeals is subject to review by this Court, whereas a sentence imposed by a district court is ordinarily final. But these perceptions of finality are derived solely from the structure created by Congress. Clearly, where Congress has provided that an appeal may be taken by the government from a district court sentence, that sentence is entitled to no greater finality than an appellate decision reducing a sentence at the defendant's behest. See *United States* v. *Wilson*, *supra*, 420 U.S. at 345.

2. *The Holding of the Court of Appeals Unjustifiably Elevates Form Over Substance*

The Court has often cautioned in the double jeopardy area that it is the substance of particular actions that is controlling, not the label given to those actions. See *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571; *United States* v. *Wilson*, *supra*, 420 U.S. at 336. Yet the decision of the court of appeals here exalts form over substance.

It is apparent that Congress could have achieved the purposes of 18 U.S.C. 3576 by passing a slightly different statute whose constitutionality could not be doubted. Congress could have provided that any defendant found to be a dangerous special offender be sentenced to a mandatory term of 25 years' imprisonment, but permitting the district court to recommend a reduced sentence to the court of appeals, which could accept the recommendation or reject it. Such a scheme would offer no conceivable foothold for a double jeopardy objection. This alternative scheme

might differ in its administrative effects from the existing statute (see Pet. App. 28a n.19), but surely the impact on the defendant, who is the person the Double Jeopardy Clause seeks to protect, is no different under this procedure than under Section 3576 as it presently stands. No double jeopardy policy is advanced by approving one of these procedures, yet declaring the other to be unconstitutional.

This point is illustrated even more forcefully by examining the sentence appeal provision contained in the proposed federal criminal code revision that was reported by the Senate Judiciary Committee in January 1980.[23] Under this statute, if the district court's

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[23] The provisions of Section 3725 of S. 1722 that pertain to government sentence appeals provide as follows.

> (b) Appeal by the Government—The government may, with the personal approval of the Attorney General or the Solicitor General, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the minimum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—
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> > (1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or

sentence is lower than the minimum established in guidelines to be issued by the Sentencing Commis-

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(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

* * * * *

(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence imposed is unreasonable, having regard for—

(1) the factors to be considered in imposing a sentence, as set forth in part III of this title; and

(2) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 2003(c).

(e) Decision and Disposition.—If the court of appeals determines that the sentence is—

(1) unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(2) not unreasonable, it shall affirm the sentence.

sion, the government may appeal the sentence. The court of appeals may then increase the sentence if it finds the sentence unreasonable. The defendant has similar rights of appeal with respect to sentences that exceed the guidelines.

The decision of the court of appeals was carefully restricted to the specific terms of 18 U.S.C. 3576 (Pet. App. 28a n.19),[24] and thus its holding does not encompass this bill, under which the government's appeal rights are more limited than under 18 U.S.C. 3576. However, the broad reasoning employed by the court of appeals would seem applicable to any statute permitting a government appeal and thus would cast substantial doubt on the validity of the Senate bill. Nonetheless, certain formalistic changes could be made to this bill that would obviate any double jeopardy objection but have no effect whatsoever on the substance.

Clearly, Congress could make the sentencing guidelines partially mandatory, giving the sentencing court no power to impose a sentence lower than the minimum. If a court nevertheless imposed a sentence below the minimum, that sentence could be increased at a later time on the settled authority of *Bozza* v.

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[24] The court of appeals rejected the government's contention that the district court's dangerous special offender sentence was "tentative," concluding that the district court sentence under the statute was effective immediately. In that connection, the court specifically refrained from expressing an opinion on any alternative formulations of 18 U.S.C. 3576 that Congress could have enacted (Pet. App. 27a-28a & n.19).

United States, supra. A mandatory sentencing scheme, however, would give up some of the critical features of the flexible scheme contained in the bill. But Congress could change the mandatory scheme slightly to eliminate the difference. The statute could provide that, even though the district court has no power to impose a final sentence below the guideline minimum, the court may recommend such a sentence to be imposed by the court of appeals if it thinks it appropriate and gives its reasons. This scheme satisfies any conceivable double jeopardy objection, yet it is not different in substance from the sentencing scheme contained in the Senate bill. No rational constitutional theory would elevate form over substance to a degree that would distinguish between the provisions of the Senate bill and the alternative scheme outlined above. The conclusion is inescapable that nothing in the Double Jeopardy Clause prohibits Congress from authorizing the government to appeal sentences.

E. Substantial Considerations Of Public Policy Support The Congressional Judgment That Appellate Review Of Certain Kinds Of Sentences At The Behest Of The Prosecution Will Improve The Administration Of Criminal Justice

The general purpose of the Double Jeopardy Clause is to protect defendants against "Government oppression." *United States* v. *Scott, supra,* 437 U.S. at 99. The focus of that protection is "principally as a restraint on courts and prosecutors," rather than the legislature. *Brown* v. *Ohio, supra,* 432 U.S. at 165.

This Court has never in the past invalidated an Act of Congress on double jeopardy grounds, and, in light of the sensible and beneficial purposes of government appeals of sentences, this case is a particularly inappropriate one for the Court to venture onto new constitutional ground.

Section 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system. A thorough study prior to the enactment of the statute concluded that "[t]here must be some kind of supervision over those trial judges who * * * tend to mete out light sentences in cases involving organized crime management personnel." Report of the President's Commission on Law Enforcement and the Administration of Justice: *The Challenge of Crime in a Free Society* 203 (1967). 18 U.S.C. 3576 was Congress' response to this plea. See generally S. Rep. No. 91-617, *supra*, at 85-87. The statute is limited in its scope and narrowly focused on the problem identified. It cannot reasonably be characterized as an example of "government oppression."

More generally, the decision of the court of appeals will seriously interfere with efforts to improve our criminal justice system. It has often been observed that sentencing is one of the areas of that system most in need of reform. See generally P. O'Donnell, M. Churgin, D. Curtis, *Toward a Just and Effective Sentencing System* (1977); M. Frankel, *Criminal Sentences: Law Without Order* (1973). Perhaps the most serious defect in the present system is "the

unbridled power of the sentencers to be arbitrary and discriminatory" (Frankel, *supra*, at 49), which results in extreme and irrational disparities in sentences given to similarly situated offenders. *Id.* at 7. These disparities encompass both sentences that are too lenient and ones that are too severe. The unfortunate result is that individual sentences are often unfair, and the sentencing structure as a whole is perceived as unfair.

While other techniques might be employed, appellate review of sentences is one obvious means of tackling this problem. See generally A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (Approved Draft 1968); National Commission on Reform of Federal Criminal Laws, *Final Report* 317 (1971). In the absence of appeal, and so long as the sentencing power continues to reside in the first instance in the trial judge, "[t]he sentencing powers of the judges are * * * so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all." Frankel, *supra*, at 8; see also *id.* at 75-85. Appellate review of sentence creates a check upon this unlimited power of one man and necessarily leads to a greater degree of consistency in sentencing.

Appellate sentence review that does not permit an increase in sentence on appeal, however, will introduce an imbalance into the system. Instead of acting to bring all erroneous sentences to an appropriate level, the system will operate only to bring

excessive sentences to an appropriate level, while allowing sentences that are too lenient to remain undisturbed. Such an imbalance would undermine and distort the effort to reduce sentence disparities. It cannot simply be dismissed as an additional advantage given to the defendant that does not seriously interfere with the structure of the sentencing system; the disparity among sentences given to similar offenders is disruptive in itself, apart from whether the sentences are excessive, and "[a]n excessively short sentence is as disruptive as an excessively long one." *Walsh* v. *Picard*, 446 F.2d 1209, 1212 (1st Cir. 1971). See generally S. Rep. No. 96-553, 96th Cong., 2d Sess. 1136-1137 (1980).

It is thus central to the success of the concept of appellate sentence review that excessively lenient sentences also be subject to review, *i.e.*, that the prosecution be permitted to appeal a sentence that is too low. Thus reform proposals have often included a right to appeal by the government. See P. O'Donnell, *et al.*, *supra*, at 63; *New York Times*, April 23, 1980, at A26 col. 1. As a result of public hearings and consultation with members of the bench and bar, the Judicial Conference of the United States has concluded in a message sent to Congress that "there should be a right to seek leave to appeal [sentences] by both the defendant and the government." Letter of March 29, 1977, from Rowland F. Kirks, Director, Administrative Office of the United States Courts to the President of the United States Senate, accompanying a proposed bill to amend Rule 35 of

the Federal Rules of Criminal Procedure.[25] Although appellate sentence review is a fairly new concept in the United States, it is not unusual in other common law countries, and those countries often permit appeal by the prosecution. See page 27, *supra*. And "[i]n European systems it is taken for granted that the appellate court has power to correct errors both ways, except that many of the Codes of criminal procedure deny the court the power to increase sentences when only the defendant has appealed," as does 18 U.S.C. 3576. *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1476 (1971).

Permitting the government to appeal a sentence is a sound legislative action aimed at ameliorating the general unfairness caused by disparities in sentences. If the Congressional decision to permit prosecutorial appeal of sentence in specified classes of cases is struck down, other means of attacking the problem of excessively lenient sentences will be sought. The alternatives to appellate review for coping with the problem are much less satisfactory, not only from the standpoint of society but to some extent from that of defendants as well. If sentence appeal is a one-way street, it is possible that some judges will err on the side of imposing sentences that are too long, knowing that they can be reduced on appeal but not increased. See *Walsh* v. *Picard*, *supra*, 446 F.2d at 1212; P.

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[25] We have been unable to locate a published source for this letter and accordingly have appended it hereto as Appendix A.

O'Donnell, *et al.*, *supra*, at 63; cf. *United States* v. *Tateo*, *supra*, 377 U.S. at 466. Even more likely is that Congress will intervene, as it did in passing 18 U.S.C. 3576. If appellate review is unavailable to control the unduly light sentences given to certain classes of offenders, the obvious alternative for Congress is to control these sentences directly by imposing substantial mandatory minimum sentences. That approach, of course, would have the unfortunate effect of reducing the flexibility that trial judges require for determining an appropriate sentence for a particular crime. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 247 (1949). The result might well be many harsh sentences to offenders for whom more lenient treatment would be appropriate. In sum, we think it apparent that interpreting the Double Jeopardy Clause to prohibit prosecutorial appeal of sentences would advance neither the interests of rational sentencing policy nor those of the class of convicted defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1980

APPENDIX A

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

Rowland F. Kirks
Director
William E. Foley
Deputy Director

March 29, 1977

Honorable Walter F. Mondale
President, United States Senate
Washington, D. C. 20510

Dear Mr. President:

At the direction of the Judicial Conference of the United States, at its session on March 10-11, 1977, I am transmitting herewith a proposed bill to amend the Federal Rules of Criminal Procedure to provide for appellate review of sentence in certain circumstances.

The Judicial Conference has over a period of years through its Advisory Committee on Criminal Rules considered and circulated among the bench and bar of the nation and held public hearings on a proposal regarding appellate review of sentences. As a result the Conference has concluded that there should be an opportunity for review of a criminal sentence of a year or longer in the courts of appeal and that

there should be a right to seek leave to appeal by both the defendant and the government.

In the normal course, proposed rules are forwarded by the Conference to the Supreme Court for promulgation by the Court. If promulgated, they are forwarded to the Congress and take effect in due course in the absence of a congressional veto. In the present instance, however, there is general agreement that affirmative congressional action is required to provide for a right of appeal by the government. There is also agreement that the details of the procedures are appropriately dealt with by a rule and that review at the instance of either the defendant or the government should be dealt with in integrated fashion in a single rule.

Accordingly, the proposed bill is forwarded for the consideration of the Congress. Representatives of the Conference and its committees will, of course, be pleased to be of assistance in the consideration of this proposal.

Sincerely,

/s/ Rowland F. Kirks
ROWLAND F. KIRKS
Director

Enclosure

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Supreme Court, U. S.
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No. 79-567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

EUGENE DiFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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EUGENE DiFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether respondent was properly determined to be "dangerous" as defined and required by 18 U.S.C. 3575.

2. Whether that portion of 18 U.S.C. 3576 which authorizes the government to appeal a sentence, where the defendant has not, is constitutional.

3. Whether 18 U.S.C. 3575 and 3576 are applicable to this respondent.

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OPINION BELOW

The Court of Appeals' opinion is at 604 F.2d 769.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

They have been set forth in appellant's brief except Rule 32 (a) (1) of the Federal Rules of Criminal Procedure which provides as follows:

> "IMPOSITION OF SENTENCE. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court."

STATEMENT OF THE CASE

In March of 1975 respondent, Eugene DiFrancesco, was sentencted to 18 months imprisonment by Federal District Judge Harold P. Burke. On March 17, 1978, the respondent was sentenced in another matter to 9 years imprisonment by Federal District Judge George C. Pratt. The sentence by Judge Pratt was after the conviction herein involved but before the sentence herein involved was imposed. On April 28, 1978, the respondent was again sentenced by Judge Burke and is the sentence in issue here. Judge Burke sentenced him to 10 years imprisonment to run concurrent

with the 9 year sentence of Judge Pratt which had been imposed a little over one month previous. All sentences were imposed in Rochester, in the Western District of New York.

The government alone, not the respondent, sought review of Judge Burke's sentence on appeal pursuant to 18 U.S.C. 3576.

All three of the above sentences were for less than the maximum provided.

Prior to the sentencing herein the government brought proceedings on March 17, 1978, urging Judge Burke to find Eugene DiFrancesco a Special Dangerous Offender pursuant to 18 U.S.C. 3575 [P.A. 17]. Subsection (f) therein provides in pertinent part that "a defendant is dangerous for purposes of this Section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." [P.A. 4]. The underlying conviction herein was for two counts of violating 18 U.S.C. 1962 (c) & (d). Each count carried a 20 year maximum.

After the proceedings of March 17, 1978, the government submitted proposed Findings of Fact to Judge Burke. He adopted the proposed Findings on April 21, 1978, except for the last four lines of the finding portion which Judge Burke crossed out, namely, "and that confinement of the defendant for a period longer than that provided for violation of 18 U.S.C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant." [P.A. 43].

SUMMARY OF ARGUMENT

1. Eugene DiFrancesco was never determined to be a Special Dangerous Offender as defined and required by 18 U.S.C. 3575.

2. Not only is it unconstitutional for the government to appeal sentence where the defendant has not, but such a practice, where it might appear equitable on its face, would in reality greatly upset our present judicial system by interjecting a foreign concept and add a large burden to our appellate courts.

3. The section in issue here, namely, 18 U.S.C. 3576 is inapplicable because the sentencing judge could have imposed a sentence of over 25 years without it.

ARGUMENT

1.

THE DISTRICT JUDGE NEVER MADE A DETERMINATION, AS IS REQUIRED, THAT CONFINEMENT BE LONGER THAN PROVIDED FOR THE UNDERLYING FELONY.

18 U.S.C. 3575, which is necessarily involved herein, requires in Subsection (f) a determination that confinement for a period longer than that provided for the underlying felony is required. Here the underlying felony provided 20 years on each count. Judge Burke imposed a 10 year sentence. This is a clear indication that Judge Burke did not find "a period of confinement longer than that provided for such felony is required for the protection of the public", 18 U.S.C. 3575 (f).

The government's foundation is built on sand. An essential element of the section herein involved, namely, 18 U.S.C. 3576 is a determination of "dangerous" as defined in 18 U.S.C. 3575 (f). Such a determination was not made here. Eugene DiFrancesco was not properly determined to be a "Special Dangerous Offender". Therefore an appeal of his sentence by the government is improper even under the statute they seek herein to uphold, namely, 18 U.S.C. 3576.

Judge Burke stated, after the government had completed their presentation at the proceedings on March 17, 1978, in which the government had moved to have Eugene DiFrancesco declared a Special Dangerous Offender, that "About the only thing that's new here this morning that I have heard here is his birth certificate." [P.A. 31]. Judge Burke made that statement in cutting off Paul Shanahan's remarks on behalf of respondent, Eugene DiFrancesco, and, it is submitted, clearly indicated the Judge's frame of mind as not being overly impressed with the government's contentions. Clearly the Judge did not find that a period of confinement longer than that provided for such felony was required. In addition, Judge Burke struck that language from the government's proposed Findings of Fact that would have indicated such a determination, namely, he struck "and that confinement of the defendant for a period longer than that provided for violation of 18 U.S.C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant." [P.A. 43].

Judge Pratt in sentencing respondent, after the respondent had been convicted herein but before the sentence herein was imposed, also sentenced for less than the maximum. In other words, both Judges with all available information before them clearly determined that a period of confinement shorter than that provided by existing statutes was required.

If a proper finding of "Dangerous" is made as defined by 18 U.S.C. 3575 (f), then there will be no need for the government to appeal sentence as provided by 18 U.S.C. 3576, the statute under consideration here. The judge would necessarily have to have determined that "a period of confinement longer than that provided for such felony is required" 18 U.S.C. 3575 (f). In this case, either count of Eugene DiFrancesco's conviction provided for 20 year sentences. A longer period would be 25 years or fairly close thereto, at least in excess of 20 years. As noted below, Judge Burke was entitled, without benefit of 18 U.S.C. 3575, to impose a sentence of 40 years total on the two counts, 18 U.S.C. 1962 (c) & (d).

If any judge determines that a defendant is a Special Dangerous Offender as provided by 18 U.S.C. 3575, such a judge would also necessarily be inclined to impose a severe sentence. Therefore, the government's right to appeal under 18 U.S.C. 3576 is not needed.

If a conflict is determined to exist between the oral sentence pronounced by Judge Burke at sentencing and the determination of the respondent as a Special Dangerous Offender which it is submitted he acquiesced in, partially to placate the government, then it has been determined that the oral sentence pronounced constitutes the judgment and anything inconsistent is a nullity, *Hill v. U.S. ex rel. Wampler,* 298 U.S. 460, 464 & 465 [1936]; and *Johnson v. mabry,* 602 F.2d 167, 170 (8th Cir., 1979). A conflict between an oral sentence and a written sentence and commitment, the oral sentence governs, *U.S. v. Mason,* 440 F.2d 1293 (10th Cir., 1971); *Scott v. United States,* 434 F.2d 11 (5th Cir., 1970); and *Baca v. U.S.,* 383 F.2d 154 (10th Cir., 1967). The oral sentence pronounced by the sentencing judge, Judge Burke, was 10 years and it is

submitted anything inconsistent, i.e. determination of Special Dangerous Offender, is a nullity. That sentence was certainly shorter than that provided for the underlying felony, 18 U.S.C. 1962 (c) & (d) namely, 20 years.

POINT II

GOVERNMENT APPEAL OF SENTENCES IS UNCONSTITUTIONAL AND WOULD OVERBURDEN OUR APPELLATE COURTS

On its face, it may well appear equitable to permit the Government to appeal a sentence considered too lenient. However, it has been the practice in this Country by tradition, and by statute, that a defendant personally be afforded an opportunity to make a statement, right of allocation, at the time of imposition of sentence, Fed. Rules of Crim. Proc. 32(a) (1); *U.S. v. Core,* 532 F.2d 40 (7th Cir.-1976); and *U.S. v. Murphy,* 530 F.2d 1 (8th Cir.-1976).Incarcerated defendants, such as Eugene Di-Francesco, rarely, if ever, are allowed to personally appear before Appellate Courts, much less be afforded the opportunity to speak.

Our appellate courts continue to be overwhelmed with cases. It has been reported that there was a 7.8 percent overall increase in pending cases last year for the Courts of Appeals (Year-End Report On The Judiciary by Chief Justice Warren E. Burger, Sept. 31, 1979, p. 3). To burden the Courts of Appeals with sentencing consideration on application of the Government, would be to impose a large additional burden. In some sentencing situations a defendant may have many dozens of letters and other testaments

submitted on his behalf. Many of which might be handwirtten. To submit these along with the presentence report in such a manner as to be considered by Courts of Appeals would be a great additional administrative burden as well as a judicial one. Also to be considered is the premise that letters from different people, for example, politicians, business people, clergymen, etc., could have considerably different impact on the sentencing Judge because of his familiarity with the status and reputation of the person writing the letter, over and above what is contained in the letter. Appellate courts would not in many instances have this prospective.

District court judges have had wide discretion in determining sentence. Sentences are generally not questioned on appeal as long as they are within statutory limits and there is no showing of arbitrary or capricious action, *U.S. v. Hayes,* 589 F.2d 811 (5th Cir.-1979). A statement of reasons justifying the trial Judge's sentence is not mandatory, *U.S. v. Scijo,* 537 F.2d 694 (2d Cir.-1976).

A judge in imposing sentence can consider the defendant's conduct, for example, gestures and facial expressions made during the course of trial, in determining an appropriate sentence, *U.S. v. Biscoe,* 518 F.2d 95 (1st Cir., 1975). A trial judge is not confined to history of criminal convictions in determining an appropriate sentence. Activities of the defendant, including his relations to public and police authorities, his position in the community and other factors bearing on his life are relevent in determining punishment, deterence and rehabilitation, *U.S. v. Marcello,* 423 F.2d 93 (6th Cir., 1970).

A sentencing judge's access to information should be almost completely unfettered in order that he may acquire a thorough acquaintance with the character and history of the

man before him. This policy has been held to permit the broad acceptance of hearsay in the sentencing procedure, *U.S. v. Schipani,* 435 F.2d 26 (2nd Cir., 1970).

A trial court should have broad discretion as to what type of information to utilize in sentencing and it has been held not to be improper to use information not in the presentence report, *U.S. v. Jones,* 487 F.2d 676 (9th Cir., 1973).

In order for the Courts of Appeals to adequately pass on sentences, it would appear necessary for the sentencing judge to articulate as a matter of record in some fashion his reasons for the sentence he imposed. An appellate court would be in no position to pass judgment on the sentence below, if it did not have the reasons for the imposition of sentence available to consider. By forcing the sentencing judge to articulate as a matter of record his reasons for imposing sentence, a limitation of discretion would necessarily also be imposed. The present philosophy prevailing in our Federal system appears to be one encouraging the use of discretion and consideration of all aspects of a situation in imposing sentence. It is submitted, that many of the factors considered by a sentencing judge would be difficult to articulate for review by an appellate court.

In this case, Judge Burke well knew Eugene DiFrancesco. He had sentenced him on a previous occasion and was well aware of the situation prevailing the City of Rochester, New York. It is to be noted that in all the arsons alluded to by the government there were no physical injuries. In the one case involving physical injury, namely, the murder of Angello Massaro, the conviction of Eugene DiFrancesco and others was vacated and dismissed on motion of the District Attorney of Monroe County, New York, because of the perjured testimony of various law enforcement people. There have been indictments of those law enforcement

people because of that perjured testimony.

It is to be noted in passing that the petitioner's contention that respondent's counsel conceded the validity of the government's public records and offered no evidence is an attempt to place an erroneous impression before this Court. Mr. Shanahan, defense counsel below, objected to the certificate of conviction with regard to the murder because it was not only reversed but actually vacated and set aside [P.A. 29]. Further Mr. Shanahan cut short his presentation because Judge Burke interjected [P.A. 31] that "About the only thing that's new here this morning that I have heard here is his birth certificate.", clearly indicating that he was not overly impressed with the government's contentions. There is no question that Judge Burke was aware that the government was requesting a 25 year sentence [P.A. 31] and in consideration of all factors, one of which was Judge Burke's forty plus years of experience on the Federal bench in that community, chose to impose a sentence of 10 years. Judge George C. Pratt, of the Eastern District of New York, sitting in Rochester temporarily, sentenced Eugene DiFrancesco on March 17, 1978, to a total of nine years on a multi-count conviction. This was less than the maximum provided. That conviction and sentence by Judge Pratt was subsequent to the conviction herein, but before the sentencing by Judge Burke.

The government as appellant in this matter requested, for the first time in the history of the United States jurisprudence, that a Court of Appeals review and impose an increased sentence upon a criminal defendant who did not seek review of his sentence. It is our position that 18 U.S.C. 3576, which purports to give the government that right, is violative of the Fifth Amendment of the Constitution of the United States which provides that no person shall "be

subject for the same offense to be twice put in jeopardy of life or limb".

In *United States v. Benz,* 282 U.S. 304 (1931) this Court set forth the double jeopardy argument as follows:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument seems to us irresistable, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." [Id at 282 U.S. 308].
>
> Quoting Ex Parte Lange, 85 U.S. (18 Wal.) 163 at 183 (1873).

One of the protections afforded by the guarantee against double jeopardy has often been said to consist of the protection against multiple punishments for the same offense, *North Carolina v. Pearce,* 395 U.S. 711 (1969). As noted below, this protects the individual against oppression by the government, embarrassment, expense and promotes integrity of final judgments, *United States v. Scott,* 437 U.S.

82, 92 (1978) and *United States v. Wilson,* 420 U.S. 332 at 343 (1975) wherein this Court stated:

> "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense."

Eugene DiFrancesco is presently serving the sentence imposed by Judge Burke in the Federal Prison at Atlanta, Georgia. He did not appeal his sentence to the Second Circuit Court of Appeals but rather argued in response to the government as appellant, that the sentence imposed below should not be disturbed.

POINT III

THE CONSTITUTIONALITY OF 18 U.S.C. 3576 SHOULD NOT BE PASSED ON HERE BECAUSE THAT STATUTE IS NOT APPLICABLE.

The Special Dangerous Offender Statute, 18 U.S.C. 3575, provides for sentences of up to 25 years. The respondent, Eugene DiFrancesco, could have received 20 years under Count I of his conviction, 18 U.S.C. 1962 (d), and an additional 20 years under Count II, 18 U.S.C. 1962 (c), for a total sentence of 40 years on the conviction herein involved. As Judge Haight stated in his concurring opinion below, "If the period of confinement provided for the felony by the underlying statute equals or exceeds twenty-five years, the dangerous special offender statute has no office to perform.", 604 F.2d 769 at 788. The constitutional issue should be avoided if possible. *U.S. v. Batchelder,* 442 U.S. 114 (1979).

CONCLUSION

The Writ of Certiorari granted in this matter should be withdrawn because the respondent was never properly determined to be a special dangerous offender as required by the statute in issue and further the statute is inapplicable in any event because of the sentences provided for the underlying conviction, or in the alternative the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends (Br. 6-9, 14) that, apart from constitutional considerations, the government's appeal should be dismissed because respondent does not qualify as a dangerous special offender under 18 U.S.C. 3575. That issue is not before this Court. There can be no doubt that the district court found respondent to be a "dangerous special offender" (A. 35), although the sentence it imposed is inconsistent with that finding. Whether that determination was erroneous is a question that the court of appeals may consider if it takes jurisdiction of the government's appeal. The only question before this Court is whether the court of appeals erred in holding that it lacked jurisdiction to hear the government's appeal on the ground that 18 U.S.C. 3576 violates the Double Jeopardy Clause.

In any event, respondent's objections are without substance. To be sure, the court's lenient sentence is at odds with its finding that respondent was a "dangerous" offender under 18 U.S.C. 3575.[1] That is the basis for the government's appeal. But that fact does not eliminate the constitutional question in this case. Even assuming that, as respondent asserts, the district court's sentence should be construed as a ruling that respondent was not a dangerous special offender, the sentence would still be appealable under Section 3576. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 166 (1969); *United States* v. *Ilacqua*, 562 F. 2d 399, 402 (6th Cir. 1977), cert. denied, 435 U.S. 917 (1978). The court of appeals would have to consider whether respondent should have been sentenced as a "dangerous special

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[1]Contrary to respondent's suggestion (Br. 7, 11-12), Judge Pratt did not sentence respondent at his bombing trial to a term below the maximum because he believed that respondent was not dangerous. Along the lines of Judge Burke's later written findings at the dangerous special offender hearing, Judge Pratt clearly indicated at the sentencing hearing of March 17, 1978, that he felt respondent was a dangerous criminal (Tr. 18-19):

> [Respondent's offenses] are among the most serious violations of the law recognized by the legal system. * * * He has continued in a pattern of criminal activity in crimes which relate to extortion, assault, burglary, racketeering. I have searched the presentence report and listened carefully throughout the proceedings here this morning for some offsetting factors and have found very little. The history of the defendant appears to be that of defiant, antisocial conduct. His prior incarcerations have apparently failed to deter any further criminal behavior on the part of the defendant. He has given no indication or remorse, of desire or willingness to relinquish his criminal ways or of any respect or regard for his fellow man, for society, or for the law.

Judge Pratt explained that he imposed concurrent, rather than consecutive, sentences on the bombing counts only because they involved the "same combination of acts" (Tr. 20). He imposed an eight-year sentence on the bombing count, rather than the ten-year maximum, because he felt it was equitable to give respondent credit for time served on a state conviction that was set aside on appeal (*id.* at 21).

offender," and thus whether his sentence should be increased. The same question would still remain for this Court—whether a sentence imposed by the district court is imbued by the Constitution with a degree of finality such that Congress may not provide that it may be increased on appeal.

2. Amicus American Civil Liberties Union (ACLU) erroneously asserts (Br. 7, 37-40) that the fundamental prohibition of the Double Jeopardy Clause is that any readjudication of facts, except at the defendant's request, is forbidden. The primary basis given for this conclusion is the fact that *United States* v. *Wilson*, 420 U.S. 332 (1975), involved a correction of an error of law (Br. 23-24). We disagree with this proposition and its proposed application to the instant case on two counts: First, we think it plain that the Double Jeopardy Clause draws no absolute distinction between factual and legal questions; second, even assuming that it did, such a distinction would be irrelevant here because no readjudication of facts is required by the government's appeal in this case.

As discussed in our opening brief (at 18-24), the constitutional prohibition focuses upon the need for a retrial on the issue of guilt or innocence, not the degree to which the issue sought to be appealed is a factual one. Thus, when a jury returns a verdict of not guilty, the government is equally precluded from seeking review of legal errors as it is of factual ones. Moreover, while we are not quite sure what amicus means when it speaks of "readjudication of facts" (Br. 37), it is equally clear that the government may seek review of questions that require the appellate tribunal to undertake a searching inquiry into the factual record. This Court itself has reviewed a post-trial suppression ruling and reversed the suppression after weighing the facts and their legal consequences. *United States* v. *Ceccolini*, 435 U.S. 268

(1978). And every court of appeals to consider the question has held that the Double Jeopardy Clause permits the government to appeal from a post-guilty-verdict acquittal entered by a district court.[2] So long as retrial would not be required by the government's appeal, the question whether the appeal involves "factual" or "legal" issues has never been thought material.

Even assuming *arguendo* that the Constitution would bar a de novo sentencing hearing by the court of appeals, it is apparent that no such hearing is involved here. The statute provides that the sentence review is to be had "on the record of the sentencing court." The ACLU confuses (Br. 29, 40-41) this review of the record with a readjudication of facts decided below. In most appeals it is necessary for the reviewing court to examine the record, but no "readjudication" of facts is thereby involved.[3] Although the ACLU characterizes (Br. 41) review under Section 3576 as "*ab initio*, * * * wholly without regard to * * * the trial court's action," the statute does not contemplate a de novo factual determination by the court of appeals based on the record below. The scope of review is quite narrow; the

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[2]See, *e.g.*, *United States* v. *Forcellati*, 610 F. 2d 25 (1st Cir. 1979), cert. denied, No. 79-5945 (Mar. 24, 1980); *United States* v. *De Garces*, 518 F. 2d 1156 (2d Cir. 1975); *United States* v. *Cahalane*, 560 F. 2d 601, 603 n.2 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1980); *United States* v. *Burroughs*, 537 F. 2d 1156 (4th Cir. 1976); *United States* v. *Cravero*, 530 F. 2d 666 (5th Cir. 1976); *United States* v. *Jones*, 580 F. 2d 219, 221-222 n.3 (6th Cir. 1978); *United States* v. *Allison*, 555 F. 2d 1385 (7th Cir. 1977); *United States* v. *Donahue*, 539 F. 2d 1131 (8th Cir. 1976); *United States* v. *Rojas*, 554 F. 2d 938 (9th Cir. 1977); *United States* v. *Calloway*, 562 F. 2d 615 (10th Cir. 1977).

[3]The ACLU notes (Br. 30, 41) that a "hearing" is required before the court of appeals may increase the defendant's sentence. We think it clear from the statute, however, that this language does not provide for a duplication of the sentencing hearing held in the district court, but rather constitutes a requirement that the defendant be afforded an opportunity to be heard through counsel in oral argument, as in most appeals.

statute provides that the court of appeals should review whether "the findings made were clearly erroneous, or the sentencing court's discretion was abused."

Finally, it must be noted that, in this case, the government did not challenge the district court's factual findings in any way. We fully accept them and raised on appeal only the question of the proper legal consequences to be attached to those facts. Thus, the appeal in this case, held unconstitutional by the court of appeals, does not even involve the narrow review of the district court's factual findings authorized by the statute, but only the legal question of abuse of discretion by the trial court in imposing sentence.

3. The ACLU also takes issue (Br. 43-45) with our argument (Br. 33-42) that trial and sentencing are significantly different for double jeopardy purposes, so that a statute authorizing review and redetermination of a sentence would not offend the Constitution even though one authorizing a retrial after review of an acquittal would. While we do not for one moment question the importance to a defendant of the sentence imposed upon him after conviction, amicus' arguments are unconvincing because they wholly fail to come to grips with the necessary implications of *Wilson*.

Whatever else may be said about a defendant's interest in retaining the benefits of a lenient sentence, that interest cannot exceed the interest of a defendant (such as Wilson) in retaining the benefits of an acquittal or a dismissal of the charges against him. Yet *Wilson* and its progeny (see note 2, *supra*) clearly settle that the Double Jeopardy Clause does not protect such interests except where the government's appeal would require a new trial. Indeed, *Wilson* implicitly confirms that trial and sentencing are wholly different matters for double jeopardy purposes, since

the government appeal that it permits would, if successful, have as one of its consequences the sentencing of the defendant, with all the ordeal and expense that that entails. If sentencing and trial were part of a unitary whole for double jeopardy purposes, then the recognition in *Wilson* that further trial proceedings are barred would presumably have precluded sentencing proceedings as well.

It is equally settled by *Wilson* and other cases authorizing government appeals in the face of double jeopardy objections that the ordeal and expense inherent in defending against the appeal itself is not material to the double jeopardy analysis. Here, as in those cases, the appeal entails the presentation of briefs and argument by counsel in an appellate court, a proceeding wholly different in character from a trial. The defendant would ordinarily not even be present. Moreover, the potential public embarrassment and stigma associated with appellate proceedings is minimal when contrasted with that attending trials. See Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences,* 18 Am. Crim. L. Rev. 51, 67 (1980).

Finally, although it is not controlling of the double jeopardy issue, it is certainly relevant that the Court has recognized substantial distinctions between trial and sentencing for due process purposes. See *United States* v. *Grayson*, 438 U.S. 41 (1978); *Williams* v. *New York*, 337 U.S. 241 (1949).

4. The ACLU mistakenly claims (Br. 30-33) that the common law prohibited amending a sentence once it was imposed. Prior to 1907, no right of appeal existed in criminal cases in England. If review could be obtained, it was on a writ of error. See *Harris's Criminal Law* 840 (22d ed. 1973). Because of the nature of this procedure, the higher court's options were limited to denying the writ, thereby

leaving the judgment undisturbed, or granting it, thereby discharging the prisoner; the court could not alter the judgment below.[4] However, the trial court was free to amend a sentence at any time before the judgment was entered on the rolls at the end of the court's term, even in capital cases.[5] Thus, in *Rex* v. *Fletcher*, 1 R. & R.C.C.R. 58, 168 Eng. Rep. 682 (1803), although the judges were divided on the question whether the death sentence pronounced was defective (because it did not provide for dissection), all the judges agreed that the omission could have been remedied by the trial judge "as the sentence may be corrected or altered at any time during the assizes." *Id.* at 683. Accord, *Rex* v. *Price*, 6 East 323, 102 Eng. Rep. 1310 (1805).[6]

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[4]See, *e.g.*, *Rex* v. *Bourne*, 7 Ad. & E. 58, 112 Eng. Rep. 393 (1837) (judgment reversed and prisoners discharged because they were sentenced to transportation for a crime punishable only by death).

[5]As noted in our opening brief (at 25-26), this function of the rolls of the court carried over into America. Thus, in addition to the section cited by the ACLU, the Massachusetts Body of Liberties also provided:

> Everie Action betweene partie and partie, and prceedings against delinquents in Criminall causes shall be briefly and destinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not *afterwards* brought againe to the vexation of any man.

Green v. *United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting), quoting Colonial Laws of Massachusetts 47 (emphasis added).

[6]*Rex* v. *Walcot*, 90 Eng. Rep. 533 (1694), cited by Amicus ACLU (Br. 32 n.4), is not to the contrary. A more complete report of that case at 4 Mod. 396, 87 Eng. Rep. 464 (1694), reveals that it involved a collateral attack by the son of Thomas Walcot, who had been executed for treason, seeking to reverse the forfeiture of his father's lands on the ground that the judgment of treason was technically invalid. The court did not hold that it could never order increase of a

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

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sentence after imposition, but instead recognized that that might be possible in certain circumstances. In the case before it, however, nothing could be done to "increase" the sentence because the collateral attack was brought in a different court from the one that had initially imposed the defective sentence.

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No. 79-567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, *Petitioner,*

v.

EUGENE DIFRANCESCO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* URGING AFFIRMANCE

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NO. 79-567

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, Petitioner,

v.

EUGENE DiFRANCESCO, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, URGING AFFIRMANCE

INTEREST OF THE AMICUS */

Continuously since its founding in 1920, Amicus, American Civil Liberties Union, has sought to protect the fundamental rights guaranteed by the Constitution,

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*/ All parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to the Court's Rule 36.2.

and to prevent violations of those rights. Amicus hopes that an argument presented by an organization experienced and concerned with protecting constitutionally guaranteed liberties may aid the Court in resolving the important constitutional question presented by this case.

SUMMARY OF ARGUMENT

From its earliest days to the present, the double jeopardy concept has protected the accused against being twice sentenced for the same crime, unless retrial is initiated by the defendant. Absent this protection, the correlative right not to be twice prosecuted would have little value. The soundness of the principle against multiple sentencing is such that until 18 U.S.C. § 3576 was enacted in 1970 no federal statute permitted government appeal of a sentence.

Section 3576 authorizes a second sentencing court to readjudicate facts, including factual review of all of the first court's proceedings. That procedure cannot be reconciled with this Court's decisions dating back more than a century, which hold that the double jeopardy clause forbids readjudication of facts unless initiated by the defendant. It is established that the double jeopardy clause bars the Government from seeking retrial after conviction. Because sentences implement and are attached to verdicts, logic compels that a sentence cannot constitutionally be appealed by a party which is barred from appealing the verdict to which it is attached.

This is not a case where, as in Swisher v. Brady, 438 U.S. 204 (1978), a

tentative, recommended punishment is increased on review by the trial court. Here, the sentence imposed by the trial court is definitive, not tentative, and two courts make separate, binding rulings.

There is no less jeopardy in being twice sentenced than in being twice tried. In each instance the power of the state is pitted against the defendant, at the defendant's peril. The Constitution does not permit the Government's interest in lengthening sentences to be balanced against the hardship to the defendant. Where the double jeopardy clause applies, "its sweep is absolute." Burks v. United States, 437 U.S. 1, 11 n.6 (1978).

Section 3576 nullifies the basic right to a single confrontation with the

state. The Court of Appeals correctly held that the statute is unconstitutional on its face. In any event, where, as here, the sentence is being served during the pendency of the appeal, double jeopardy bars the appeal.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE HAS ALWAYS PRECLUDED READJUDICATION OF FACTS UNLESS INITIATED BY THE DEFENDANT.

The Court has not ruled on the constitutionality of government appeal of a sentence, nor on whether an appellate court may constitutionally lengthen a sentence. No prior federal statute has authorized either practice, nor has the constitutionality of the 1970 statute at issue, 18 U.S.C. § 3576, been addressed by the Court to date.

To understand why Section 3576 violates the double jeopardy clause, review is necessary of the Court's development of the double jeopardy concept in a line of decisions extending over many years. Although these decisions have been said to be a hodge-podge from which no principle can be deduced or succinctly expressed, 1/ Amicus suggests otherwise: The Court's double jeopardy decisions stand for the principle that the Government may not overreach by repetitive use

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1/ "The riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion." Note, 24 Minn. L. Rev. 522 (1940), quoted in Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 82; see also Burks v. United States, 437 U.S. 1, 9 (1978).

of the criminal justice process against the defendant. Two subordinate double jeopardy principles which these decisions establish are that (1) readjudication of facts, except when initiated by the defendant, is forbidden; and (2) the criminal justice process is not a game which the defendant automatically wins because the prosecutor or trial court has committed non-factual error.

Part I of this brief chronologically identifies leading double jeopardy decisions, which stand for the foregoing principles. Part II shows why application of these principles and decisions requires affirmance of the holding below that 18 U.S.C. § 3576 violates the double jeopardy clause. Part III demonstrates that in any event Section 3576

is unconstitutional as applied where, as here, the sentence is being served while on appeal by the Government.

Petitioner in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), was found guilty of stealing mailbags, the statutory punishment for which was imprisonment for not more than one year or a fine. The trial judge imposed a prison sentence and a fine. Petitioner paid the fine, was imprisoned, and sought habeas corpus, claiming double jeopardy. This Court agreed, discharged petitioner, and held that his service of a valid sentence (the fine) barred the court from punishing him further. The Court said:

> If there is anything settled in the jurisprudence of England and America, it is that

no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. [Id. at 168.]

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. [Id. at 173.]

In Murphy v. Massachusetts, 177 U.S. 155 (1900), defendant was convicted of embezzlement and sentenced, but succeeded in having the sentence overturned on appeal. Although finding no constitutional infirmity in the resentencing, the Court emphasized that a different result might have followed had the defendant not caused the sentence to be vacated:

> We repeat that this is not a case in which the court undertook to impose in invitum a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered. [Id. at 160.]

One of three defendants in United States v. Ball, 163 U.S. 662 (1896), was acquitted by a jury. The

other two were convicted, and successfully appealed. The Government then reindicted all three defendants on the same charge. This Court held that even though his acquittal was based on a defective indictment, retrial of the acquitted defendant was barred by the double jeopardy clause. However, the two convicted defendants could constitutionally be retried "because upon a writ of error sued out by themselves the judgment and sentence against them were reversed." Id. at 671-72.

The principle that double jeopardy precludes government appeal following adjudication of facts was confirmed in Kepner v. United States, 195 U.S. 100 (1904). There, defendant was acquitted by the trial judge in a court

under United States jurisdiction located in the Philippines. 2/ The United States appealed to the Supreme Court of the Philippines, which reversed the trial court, found Kepner guilty and sentenced him. Kepner appealed to this Court, claiming double jeopardy. The Court reversed and discharged Kepner from prison, holding: "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered . . . ." Id. at 130.

Stroud v. United States, 251 U.S. 15 (1919), expressed the Court's

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2/ This Court in Kepner held that the statute at issue conferred rights substantially identical to those conferred by the double jeopardy clause. The Court has always treated Kepner as expressing valid constitutional doctrine. See United States v. Wilson, 420 U.S. 332, 346 n.15 (1975).

long-held view that retrial is permissible if predicated on a defendant's successful appeal. Stroud was initially convicted of first degree murder and sentenced to death. On appeal, the United States attorney confessed error, and the Court of Appeals reversed. At retrial, Stroud was again found guilty of first degree murder, but the jury recommended life imprisonment. When Stroud then appealed to this Court, the Solicitor General confessed error. Stroud was retried, convicted, and sentenced to death. He again appealed, claiming double jeopardy by reason of the fact that while the second sentence was life imprisonment, the third sentence was death. This Court affirmed the death sentence, reasoning that:

> [T]he conviction and the sentence upon the former trials were reversed upon writs of error sued out by [Stroud] . . . . [T]hus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. [Id. at 18.]

In United States v. Benz, 282 U.S. 304 (1931), Benz pled guilty and was sentenced to 10 months in prison. While serving the sentence, he successfully petitioned the district court to reduce his term. The Government appealed the reduction of sentence. This Court held that a trial court may, consistently with the double jeopardy clause, shorten, but not lengthen, a sentence being served:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based

> upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment . . . . [Id. at 307.]

The district court in In re Bradley, 318 U.S. 50 (1943), erroneously sentenced petitioner to a fine and imprisonment for contempt, under a statute which provided that the sanctions were alternative. Petitioner paid the fine and sought review, claiming that double jeopardy barred imprisonment. Reaffirming the rule in Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), this Court agreed with Bradley that the double jeopardy clause required release from jail: "Since one valid alternative provision of the original sentence has been satisfied, the

petitioner is entitled to be freed of further restraint." 318 U.S. at 52.

Bozza v. United States, 330 U.S. 160 (1947), presented a variation on the theme of Ex parte Lange and In re Bradley. Bozza was convicted of violating a statute which carried a mandatory sentence of a fine and imprisonment. The trial judge, in imposing sentence, inadvertently neglected to fine Bozza, but corrected the error five hours later. Bozza appealed, arguing double jeopardy, but this Court was unpersuaded. Noting that the initial sentence was invalid and unenforceable, the Court said:

> The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. In this case the court "only set

> aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender." [Id. at 166-67 (citations omitted).]

Petitioner in Green v. United States, 355 U.S. 184 (1957), was indicted for first degree murder. The trial judge instructed the jury that it could return a first or second degree murder verdict. The jury found Green guilty of second degree murder. On appeal, the conviction was overturned. Retrial resulted in a first degree murder conviction. Holding that the double jeopardy clause protects against the risk of conviction of the greater offense of which the defendant had been implicitly acquitted, this Court reversed. The Court stated that repetitive efforts by the Government to obtain a conviction subject the accused to

"embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity." Id. at 187.

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance. [Id. at 198.]

Fong Foo v. United States, 369 U.S. 141 (1962), reaffirmed the principle that a judgment which encompasses the adjudication of facts is not subject to government appeal. There, the district judge, in the middle of a jury trial, directed the jury to return verdicts of acquittal. Holding that the district court lacked power to direct verdicts in the circumstances, the Court of Appeals

reversed and remanded for a new trial. This Court agreed that the directed verdicts of acquittal were "based upon an egregiously erroneous foundation." Id. at 143. Nonetheless, the Court reversed, holding that a verdict of acquittal is final and cannot be reviewed without violating the double jeopardy clause. Id.

North Carolina v. Pearce, 395 U.S. 711 (1969), presented the question, to what extent does the Constitution limit the imposition of a harsher sentence upon retrial, when the original conviction was set aside at the behest of the accused? Pearce was convicted and sentenced to prison. The conviction was reversed on his appeal, the Supreme Court of North Carolina holding his confession to have

been involuntary. Pearce was retried, convicted, and sentenced to a term in prison which, when added to the time he had already spent in prison, amounted to a longer total sentence than that originally imposed.

This Court held that, where retrial is sought by the defendant, the double jeopardy clause imposes no absolute bar to a more severe sentence upon reconviction. The Court stated that "we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials." Id. at 722. Emphasizing that the case arose in the context of an appeal by the defendant, the Court stated that its holding "rests ultimately upon the premise that the original conviction has, at the

defendant's behest, been wholly nullified and the slate wiped clean." Id. at 720-21. 3/

Colten v. Kentucky, 407 U.S. 104 (1972), arose under a Kentucky two-tier judicial system. Colten was convicted in

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3/ The Court further limited the holding, concluding that, because due process requires that vindictiveness be precluded from figuring in the second sentence, whenever a judge imposes a more severe sentence after a new trial, he must have specific reasons for doing so. 395 U.S. at 726. Moreover, these reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. Because no such reasons were supplied in Pearce, or in its companion case, Simpson v. Rice, the Court overturned both convictions. Id. This aspect of Pearce indicates that an increased sentence by a second judge based solely on facts previously considered and adjudicated by the original trier-of-fact would be impermissible. See Whalen v. United States, 48 U.S.L.W. 4406, 4411 (April 16, 1980) (Rehnquist, J., dissenting).

an inferior court of disorderly conduct and fined $10. He then exercised his right to trial de novo in a court of general criminal jurisdiction, was tried, convicted and fined $50. A state appellate court affirmed, rejecting Colten's double jeopardy claim. This Court affirmed, reasoning that this did not present a situation where one court was "asked to find error in another court's work." Id. at 117. The Court repeatedly noted that the case arose at the request of the defendant for a new trial:

> In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement . . . and seek the judgment of judge or jury in the superior court . . . . [Id. at 119 (emphasis added).]

Accord, Ludwig v. Massachusetts, 427 U.S. 618, 631 (1976) (Massachusetts' two-tier system does not offend the double jeopardy clause because "[t]he decision to secure a new trial rests with the accused alone.")

United States v. Wilson, 420 U.S. 332 (1975), held "that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt." United States v. Jenkins, 420 U.S. 358, 368 (1975) (emphasis added) (discussing Wilson). As the Wilson Court stated,

> a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact. [420 U.S. at 345 (emphasis added) (footnote omitted).]

Thus, in Wilson, by holding that readjudication of law upon settled facts is not barred by the double jeopardy clause, the Court identified fact readjudication as a principal evil against which the double jeopardy clause protects.

Respondents in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), were tried before a jury. After the "hopelessly deadlocked" jury was discharged, the trial court entered judgments of acquittal. Id. at 565. In dismissing the Government's appeal, this Court held that double jeopardy barred retrial because the trial judge had "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." Id. at 572.

In United States v. Scott, 437 U.S. 82 (1978), defendant moved before and during trial for dismissal of two counts of the indictment on the ground that his defense had been prejudiced by pre-indictment delay. The trial court granted the motion. This Court concluded that the Government's appeal from the dismissal did not violate the double jeopardy rights of the defendant because

> in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause . . . . [Id. at 98-99.]

Emphasizing that the question of Scott's guilt or innocence on the counts of the indictment at issue had never been adjudicated, the Court held

> that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so is not barred . . . . [Id. at 101.]

The Court reasoned that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." Id. at 99.

Swisher v. Brady, 438 U.S. 204 (1978), involved the Maryland juvenile court system. This Court held that the double jeopardy clause does not prohibit the Government from taking exceptions from proposed, non-binding findings of a master in that context. Two reasons central to the holding were that (1) the state was entitled to only one opportunity to

present its evidence -- to the master -- following which the record was closed, and additional evidence could be received by the judge only with the minor's consent; and (2) the judge alone was empowered by statute to be the fact-finder and adjudicator. Id. at 216. The Court distinguished the master-judge relationship presented in Swisher from the trial judge-appellate judge relationship presented in Kepner v. United States, 195 U.S. 100 (1904). The former arrangement featured a master's tentative, non-binding ruling or suggestion subject to rejection, acceptance or modification, in the trial judge's discretion; whereas the relation of trial to appellate judge, as in Kepner, "was invoked by the Government's decision to appeal an otherwise binding judgment."

438 U.S. at 217 n.15. The Court concluded that these "material" differences warranted attaching the protection of double jeopardy in the appellate context, but not in Swisher. Id.

The Court's decisions thus show that the double jeopardy clause protects the defendant's interests in connection with punishment as well as trial, and precludes a second adjudication of facts unless initiated by action of the defendant.

II. 18 U.S.C. § 3576 AUTHORIZES EVERY TYPE OF GOVERNMENT OVERREACHING AT WHICH THE DOUBLE JEOPARDY CLAUSE IS AIMED.

18 U.S.C. § 3576 offers the Government a second opportunity to obtain punishment it considers sufficiently severe. By subjecting the accused to a

second sentencing proceeding, the statute authorizes the appellate court to readjudicate facts. This arrangement is a frontal assault on the concept of double jeopardy, and constitutes manifest government overreaching. Section 3576 permits an appellate court to review -- at the Government's behest and over the defendant's objection -- the entire factual record below, including facts adduced "during the trial" and during the trial court's sentencing hearing. The statute further authorizes the second court to review "the findings and reasons" of the trial judge; and, based on these factual readjudications, to "affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for

further sentencing proceedings and imposition of sentence." Moreover, the appellate court is directed by the statute to hold a "hearing" -- inherently duplicative of the trial court action -- in the event the appellate court intends to make the sentence more severe.

A. The Double Jeopardy Concept From Its Earliest Days Has Prohibited Twice Sentencing The Accused For The Same Crime.

The cases cited in Part I above implement and are consistent with the common law roots of double jeopardy. At the origin of double jeopardy is the central theme that the state, with its resources and advantages, is entitled to but one opportunity to bring the accused to justice. Benton v. Maryland, 395 U.S. 784, 795-96 (1969). See generally,

J. Sigler, Double Jeopardy (1969). Trial and punishment are the two methods by which the state brings its coercive power to bear against the accused. Double jeopardy is historically associated with both trial and punishment. The ancient maxim, nemo debet bis puniri pro uno delecto -- "one punishment for one wrong" -- (said to be rooted in the Biblical injunction against raising up multiple afflictions, see M. Friedland, Double Jeopardy 5-6 (1969)), was embodied in the common law pleas in bar, autrefois convict and autrefois attaint. See Comment, Twice in Jeopardy, 75 Yale L.J. 262, 265-66 n.12 (1965). Together with the third such plea, autrefois acquit, these common law pleas prohibited the state in all circumstances from twice acting against a

defendant for committing a single crime. Id. at nn.11 & 12. 4/

The common law principle that punishment is at the heart of the double

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4/ The Government rightly notes that there is some common law basis for the view that, until the conclusion of the trial court's term, a judgment of imprisonment was deemed not final, and was, therefore, subject to revision. Government Brief at 24. As many courts have repeatedly observed, however, in this country a valid sentence is final and cannot be increased where any part of it has been served. See, e.g., Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). United States v. Sacco, 367 F.2d 368 (2d Cir. 1966) and cases cited therein. See also Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144 (1861). Moreover, the common law rule in capital cases forbad changing a sentence in any respect. In Rex v. Walcot, 90 Eng. Rep. 533, the court below sentenced Walcot to be hanged, but omitted to provide that he should be disemboweled while alive. On appeal, the court rejected the government's argument that a provision for disemboweling could lawfully be added to the judgment previously announced.

jeopardy idea was expressed in the earliest American effort to articulate the double jeopardy concept, the Massachusetts Body of Liberties (1641). That document explicitly prohibited multiple sentencing, providing that:

> No man shall be twise sentenced by Civill Justice for one and the same Crime, offence or Trespasse. [§ 42, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 76 (1971).]

The Founding Fathers, too, were aware of the central place of punishment in the protection against double jeopardy. Madison's proposal, from which the double jeopardy clause derives, provided that:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense. [1 Annals of Cong. 434 (Gales & Seaton eds. 1789).] 5/

5/ In revising this formulation, Congress did not intend to change its coverage, but

[Footnote continued]

The Constitution's formulation, forbidding a second "jeopardy of life or limb" similarly reflects the historic coverage of punishment within the double jeopardy concept.

That sentencing is included within the coverage of double jeopardy was so plain by the 19th century that in 1873 this Court asked the rhetorical question:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? [Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873).]

Furthermore, this and many other courts for many years have assumed that the

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5/ (Continued)

intended only to make clear that the double jeopardy clause carried forward the full protection of the common law. See J. Sigler, supra, at 32-33.

double jeopardy clause applies to a second sentencing proceeding as well as a second trial. For example, in Reid v. Covert, four justices joined in a plurality opinion addressing the applicability of the Bill of Rights to military trials, and stated:

> In Swaim v. United States, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional. [354 U.S. 1, 37-38 n.68 (1957).]

The Court of Appeals below cited, in addition to Reid v. Covert, dicta to the same effect in this Court's opinions in Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873); Murphy v. Massachusetts, 177 U.S. 155, 160 (1900);

and United States v. Benz, 282 U.S. 304, 307 (1931), as well as dicta on point in the opinions of Courts of Appeals for five circuits. Walsh v. Picard, 446 F.2d 1209, 1211 (1st Cir. 1971), cert. denied, 407 U.S. 921 (1972); United States v. Coke, 404 F.2d 836, 845 (2d Cir. 1968)(en banc); United States v. Chiarella, 214 F.2d 838, 841 (2d Cir.), cert. denied, 348 U.S. 902 (1954); Oxman v. United States, 148 F.2d 750, 753 (8th Cir.), cert. denied, 325 U.S. 887 (1945); Frankel v. United States, 131 F.2d 756, 758 (6th Cir. 1942); Rowley v. Welch, 72 U.S. App. D.C. 351, 353 n.3, 114 F.2d 499, 501 n.3 (1940). Thus,

> [a]s is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in Ex parte Lange prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense

> . . . . [Whalen v. United States, 48 U.S.L.W. 4406, 4411 (April 16, 1980)(Rehnquist, J., dissenting).]

The Court of Appeals below evaluated this wealth of supportive dicta in these terms:

> Although such dicta of course are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court. [604 F.2d at 785.]

B. The Double Jeopardy Clause Prohibits The Government From Initiating Readjudication Of Facts.

This Court has consistently and rigorously held that facts cannot be readjudicated without violating the double jeopardy clause unless the readjudication is initiated by the defendant. 6/ See

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6/ The only arguable exception to this long-held principle involves mistrials where "manifest necessity" compels the

[Footnote continued]

cases cited in Part I, supra. This constitutional principle is historic and fundamental. Indeed, review of the cases cited in Part I of this brief shows that the prospect of fact readjudication distinguishes virtually all of the decisions where double jeopardy was found to be present from those in which it was held absent.

The rule against fact readjudication unsolicited by the defendant is not limited to action following acquittal. The Government is likewise prohibited from

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6/ (Continued)

readjudication. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). See also United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971). The mistrial cases are not germane here.

pursuing the defendant again following conviction. The common law bar of autrefois convict has been brought forward in double jeopardy law to the present day. As the Court noted in United States v. Martin Linen Supply Co.:

> The Double Jeopardy Clause also accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense. [430 U.S. 564, 569 n.6 (1977).]

Similarly, in United States v. Wilson, the Court stated:

> When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. [420 U.S. 332, 343 (1975).]

It is thus clear that the Government cannot constitutionally appeal

a conviction for the purpose of obtaining a more onerous sentence or for any other purpose. It follows that the Government cannot do directly, i.e., obtain a longer sentence on appeal, what it is constitutionally prohibited from doing by indirection, i.e., reconvict the accused to achieve that end.

C. Under 18 U.S.C. § 3576 Two Courts Make Binding Fact Adjudications.

It is not controverted that under Section 3576 the second court to rule on the sentence is entitled -- and, indeed, required if it intends to lengthen the sentence -- to make fact determinations. The fact determinations of the second court regarding the sentence are no more limited in scope than is the trial court's consideration of facts regarding

the sentence. Section 3576 authorizes the second court to review the whole "record, including the entire presentence report, information submitted during the trial . . . and the sentencing hearing, and the findings and reasons of the sentencing court." A "hearing" is required in the event the sentence is to be made more severe. The second court is also required to "state in writing the reasons for its disposition of the review of the sentence."

In short, Section 3576 invites the second court, once it has decided to resentence, to review the matter ab initio, and act on the merits of the sentence wholly without regard to, in exact duplication of, or with any variation upon, the trial court's action.

Contrary to the Government's contention below, see 604 F.2d at 782, the sentence imposed by the trial court under the statutory scheme at issue is not a "tentative" sentence. As the Court of Appeals noted, 18 U.S.C. § 3575(b) itself states that the trial court "shall sentence the defendant to imprisonment." 604 F.2d at 782 (emphasis added by the court).

> This command is not tentative; the sentence imposed is effective immediately. 18/ [Id.]
>
> [n. 18] DiFrancesco is presently incarcerated in federal prison at Atlanta, Georgia, serving the sentences imposed by Judge Pratt and Judge Burke. [Id. at n.18.]

Contrasting the instant procedure with other statutory arrangements, such as 28 U.S.C. § 636(b)(1) and 18 U.S.C.

§ 4205(c), the Court of Appeals below concluded:

> In contrast, the commitment ordered by the district court pursuant to § 3575 is neither tentative nor merely a predicate to a sentence "to be imposed" by the court of appeals. [604 F.2d at Id. at 782.]

Therefore, the procedure at issue here is completely different from a master's presentation to a judge of proposed, non-binding findings, as involved in Swisher v. Brady, 438 U.S. 204, 208-09 (1978).

D. Government Appeal Of The Length Of A Sentence Jeopardizes The Accused No Less Than Government Appeal Of A Verdict.

Jeopardy denotes risk. Double jeopardy denotes compounding the risk to the accused that he will be punished as the Government wills. The authorities

cited above demonstrate that the double jeopardy clause has always been applied to punishments, and not merely to the procedure by which the state's authority to punish is established. This comports with the reality of criminal justice. "Correction . . . [is] systemically the end of the official criminal justice processes . . . ." R. Goldfarb & L. Singer, After Conviction 9 (1973). The object of prosecution is to empower the state to punish.

The Government states in its Brief that sentencing does not involve "anything comparable" to the stigma, "anxiety," "embarrassment" and "ordeal" of trial. Government Brief at 35. Such statements defy common sense and universal experience. To the defendant -- unsure

whether one or 25 years of his life are to be committed to prison, whether he will be able to rejoin free society before old age, whether he will live again with his family -- the stigma, ordeal, embarrassment and anxiety of the sentence surely are all.

To be twice sentenced for the same crime is at least as oppressive as to be twice tried for it. Both situations involve confrontation between the individual and the state, with personal freedom at issue. The peril of being subjected to the more punitive sentence of a second court is plain. To suggest that a second sentencing proceeding is not jeopardous is to elevate dry theory above palpable reality.

E. Where, As Here, The Double Jeopardy Clause Applies, Its Protection Is Absolute, And Cannot Constitutionally Be Balanced Against The Government's Desire For A Longer Sentence.

The Government argues that sound social policy supports a second sentencing proceeding. Government Brief at 56-61. Amicus and other leading commentators vigorously disagree with the Government's position in that regard. See, e.g., Report on the Interdepartmental Committee on the Court of Criminal Appeal [England] (1965); Hon. L. Brewster, Appellate Review of Sentences, 40 F.R.D. 79 (1965); Report of Government Appeal of Sentences, 35 Bus. Law. 617, 634-41 (1980); Summary of Action Taken by the House of Delegates of the American Bar Association 13 (February 4-5, 1980). But the merits of that controversy are extraneous here. It is no

more germane to argue policy here than it would be to argue, in a First Amendment case, that sound policy supports integrating church with state, or to argue, in a Fourth Amendment case, that an unreasonable search is not unlawful because it may deter crime. The Court of Appeals below stated:

> We do not deny the existence of legitimate governmental interests that might be served by allowing the government to appeal a sentence, e.g., improved uniformity in sentencing. But such interests must be pursued in alternative ways that do not conflict with the fifth amendment's guarantee against double jeopardy. "[W]here [, as here,] the Double Jeopardy Clause is applicable, its sweep is absolute. There are no equities to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Burks v. United States, supra, 437 U.S. at 11 n.6, 98 S.Ct. at 2147. To

> subject Eugene DiFrancesco for a second time to the risk of the entire range of penalties that the law provides for his crimes would violate that constitutional policy. [604 F.2d at 787.] 7/

7/ The suggestion of the Court of Appeals below that government appeal of sentences "might" improve uniformity in sentencing is by no means shared by all authorities. As Judge Leo Brewster stated in an address to the Ninth Circuit Judicial Conference, "Appellate review would not in fact achieve uniformity. Even if the appellate courts should agree upon the manner of approach for sentences, we would have different results as between the circuits, and different results as between the panels on the same circuit, in the application of that approach. If the different circuits, and the panels on the same circuits, cannot agree among themselves on the law, they would have even more difficulty as triers of the facts, especially where they had had no opportunity to see the parties involved. To achieve even some resemblance of uniformity, we would have to have a nationwide sentence reviewing body, which would reconsider each sentence in every case tried. Even then, there would be disagreement among the members. If uniformity is the true goal, the only way it can be achieved is through mandatory sentences, which most of us judges, trial and appellate alike, oppose." Hon. L. Brewster, Appellate Review of Sentences, 40 F.R.D. 79, 85 (1965) (emphasis in original).

III. IN ANY EVENT, 18 U.S.C. § 3576 IS UNCONSTITUTIONAL AS APPLIED WHERE, AS HERE, THE DEFENDANT IS SERVING THE SENTENCE ON APPEAL.

Even if, contrary to the foregoing, Section 3576 could constitutionally authorize government appeal of a sentence in some circumstances, the statute must be held unconstitutional as applied where, as here, the sentence is being served while the appeal is pending. "It has long been clear that once a sentence has been imposed and the defendant has commenced service of it, the court is without power to increase the sentence." 2 C. Wright & A. Miller, Federal Practice and Procedure § 532, at 445 (1969). See also In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Sacco, 367 F.2d 368, 369 (2d Cir. 1966).

It would be difficult to imagine a more gross example of double jeopardy than to give the Government the power to seek, after the defendant has been sent to jail, to extend his prison term for that offense by 10, 15 or 20 years, on the ground that the trial judge was not punitive enough. To evade the coverage of the double jeopardy clause in this context would require tortuous reasoning along the lines of the Government's contention in King v. United States, 69 U.S. App. D.C. 10, 12; 98 F.2d 291, 293 (1938), that the prisoner "has served no sentence but has merely spent time in the penitentiary."

It is even possible, under the scheme of Section 3576, for the defendant to have served his entire sentence, been released, rehabilitated and reintegrated

into society while the Government's appeal is pending, and then rejailed upon imposition of the longer sentence ordered by the appellate court.

Even the Government acknowledges that "[p]erhaps there would be some ground for a double punishment finding where the defendant has completed service of a sentence prior to its increase . . . ." Government Brief at 15. However, the Government asserts that "commencement of service is a wholly fortuitous circumstance." Id. at 15-16. In support of this argument, the Government cites cases which hold that the double jeopardy clause does not prohibit revocation of probation, or bar conditional sentences. Id. at 40-41. However, in each of the contexts to which the Government refers, it is the

defendant's post-conviction conduct which is the predicate for the resulting increase in time served. Here, by contrast, the defendant has no control over the resentencing. Moreover, as the Government concedes, "These other criminal sanctions, of course, do not [unlike the instant case] involve the increase of a final sentence." Id. at 41.

This Court was right when it observed in United States v. Benz that to amend a sentence then being served for the purpose of increasing it

> is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment. [282 U.S. 304, 307 (1931).]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-567

UNITED STATES OF AMERICA,

Petitioner,

vs.

EUGENE DIFRANCESCO,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

Interest of Amicus Curiae and Consent.

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, specifically their right to be free from government appeals of sentences in violation of the Double Jeopardy Clause. Accordingly, the State Public Defender of California is filing this brief *amicus curiae* in support of the respondent herein.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by Wade H. McCree, Jr., So-

licitor General, and Patrick J. Baker, Esq., counsel for petitioner and respondent, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

ARGUMENT.

THE DOUBLE JEOPARDY CLAUSE BARS GOVERNMENT APPEALS OF SENTENCES.

INTRODUCTION.

In its opinion of August 6, 1979, reported at 604 F.2d 769, the Court of Appeals for the Second Circuit held that the statutory provision authorizing a government appeal of the trial court's sentence of a defendant who is a "dangerous special offender" (18 U.S.C. §3576) violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The State Public Defender of California argues as *Amicus Curiae* that this ruling correctly resolves the constitutional issue and should be affirmed. *Amicus* agrees with the Second Circuit's analysis that a defendant is placed twice "in jeopardy of life or limb" when the prosecution is given a "second crack" at obtaining a harsher sentence by appealing to another tribunal in hopes it will be more sympathetic to its arguments for severity.

The Government, of course, takes the position that the Double Jeopardy Clause does not bar appeals of sentences at the instigation of the government. The first problem with accepting this interpretation is that it would thwart fundamental policies underlying the Double Jeopardy Clause. Permitting the government to instigate an appellate drive to increase the degree of punishment would invariably subject the defendant to the mental anguish of increased uncertainty as to the length of his sentence as he begins to serve it. It also subjects him to the ordeal and added expense of defending his sentence on appeal having already marshalled his resources in the trial court to obtain a disposition which was favorable, at least in relative terms.

In addition to these psychological and financial tolls, a government appeal of the sentence would also defeat the

criminal defendant's "valued right to have his trial completed by a particular tribunal." (*Swisher v. Brady*, 438 U.S. 204, 215 (1978).) Such an appeal threatens to substitute the appellate tribunal's remoteness for the trial judge's familiarity with the case and his proximity to the trial and sentencing issues. It places the defendant in the unfair position of attempting to devise a sentencing strategy directed at an unknown tribunal that has not presided over the case, has had no opportunity to make a subjective evaluation of the defendant's character, and has not heard and observed the demeanor of witnesses relevant to the sentencing decision. It leaves the defendant, in short, at the mercy of a tribunal that does not know him or his case except through a cold and throughly inadequate appellate transcript.

A second problem with accepting the Government's interpretation of the Double Jeopardy Clause is that the goal it seeks to achieve through government appeals of sentences, greater uniformity in sentencing decisions, can be achieved in more effective ways that do not run afoul of the Double Jeopardy Clause. One alternative to appellate review of sentences is administrative review for disparity followed by reports back to the trial judge where appropriate, a process adopted in California and run by California's parole board. An administrative process can accomplish review of virtually every case whereas appellate review can never be that sweeping without making appeals of the sentence automatic in every case. In fact, appellate review of sentences automatically excludes review of those cases in which an appeal is not taken, diminishing significantly the data pool available to appellate courts for judging relative uniformity and proportionality.

To assist the Court in evaluating these problems, and to help it consider the impact on state courts of a ruling that government appeals of sentences are constitutional, *Amicus*

has summarized in some detail the structure of California's determinate sentencing system. It is a system that requires a trial judge to make a number of decisions in each case in which he imposes a prison sentence, and each of these decisions can give rise to government dissatisfaction with the sentence. The California example demonstrates how government appeals of sentences would negate a benefit of determinate sentencing by creating uncertainty as to a prisoner's final sentence, thereby causing the precise tension and unrest among prisoners that determinate sentences were designed to eliminate. The California system also illustrates the potential that government appeals of sentences hold for increasing the length and complexity of sentencing hearings and for increasing the workload of the appellate courts.

A. Government Appeal of Sentences Would Thwart Fundamental Policies Underlying the Double Jeopardy Clause.

1. Government Appeal of Sentences Would Subject the Defendant to the Ordeal and Expense of Twice Defending Against the Maximum Sentence.

One of the fundamental purposes of the Double Jeopardy Clause is to protect a criminal defendant, disadvantaged by limits on the resources available to him for resisting the power of the state, from having to twice defend himself against the same charges. A major concern underlying the clause is that multiple prosecutions will unfairly subject the defendant to the "embarassment, expense, and ordeal of a second trial." (See *Swisher v. Brady*, 438 U.S. 204, 216 (1978); *Green v. United States*, 355 U.S. 184 (1957).) While a government appeal of the sentence does not force a defendant through a second complete trial, it does force him for a second time to defend against the spectre of the

maximum punishment—the exact same harsh potentiality which he faced and escaped at the trial level.

The ordeal this appellate review forces on the defendant must be measured in part by the uncertainty it creates. Finality of the trial court's judgment carries psychological benefits for those imprisoned. The outcome of the criminal case has been fully revealed once the sentence is announced. The anxiety over sentence, which for many defendants is the only real concern, is dispelled and the defendant can go about the process of accomodation and resignation which may help him endure his loss of freedom. The certainty of his sentence or its outer limits allows him to predict the immediate course of his life, at least in rough terms.

This predictability is not a trivial concern. In a recent discourse on sentencing, Judge Marvin E. Frankel recognized the relationship between society's general desire for certainty and predictability in the law and the psychological needs of an individual imprisoned for crime:

> "We want to be able to plan our business and family decisions by knowing in advance just how painful the tax will be, what the zoning laws promise, how long an employment contract will endure. It may be imagined that knowing the actual length of a prison term might serve similar, though much more searing needs." (Frankel, *Criminal Sentences: Law Without Order*, pp. 96-97 (1973).)

Judge Frankel's comments were intended as criticism of the psychic toll taken by indeterminate sentences. Others have joined in that criticism recognizing that "the very indeterminancy of indeterminate sentences is a form of psychological torture." (Alschuler, *Sentencing Reform and Prosecutorial Power*, 126 U.Pa.L.Rev. 550, 553 (1978).) Government appeals of sentencing would add a new twist to that torture. For the year or more that it would take to

resolve the government's appeal, not only would the indeterminately sentenced prisoner be in the dark as to the actual period of his incarceration, he would not even know its outer limits. Increased and oppressive anxiety would have to result. The uncertainty caused by sentence appeals would have the same impact on prisoners sentenced under "fixed" or "determinate" sentence systems. Instead of knowing their final punishment after sentencing, at least within a narrow range, they would have to suffer through their first year or two of incarceration with the maximum punishment still hanging over their heads. In summary, it takes little imagination to recognize the significant ordeal for Mr. DiFrancesco in delaying the finality of his 10 year sentence so that the Government may seek the 25 year maximum in a distant and unknown appellate forum.

Defending a sentence on appeal is also expensive, especially where a defendant has just incurred the expenses of a trial. Mounting a defense in a criminal case often means the disruption of the defendant's employment, a breakdown of his family relationships and financial devastation. Having suffered these penalties and lost, and facing the bleak prospect of prison, a government appeal of the sentence would force the defendant to pull together whatever financial resources remain to resist once again the threat of the maximum punishment. Appellate representation by competent criminal specialists does not come cheaply and the expense of a government appeal to the defendant cannot be lightly dismissed.

2. Government Appeal of Sentences Would Deprive the Defendant of His Right to Have His Trial Completed by a Particular Tribunal.

In addition to protecting the defendant from the ordeal and expense of multiple proceedings, the Double Jeopardy

Clause also protects the defendant's "valued right to have his trial completed by a particular tribunal." (*Swisher v. Brady, supra,* 438 U.S. at 215.) Government appeals of sentences would undermine that right by denying finality to the sentencing decision of the judge who has conducted the trial and who presided at the sentencing proceedings. It would interject into the sentencing process an appellate tribunal that is a stranger to the history and development of the case and that has had no opportunity to observe and evaluate the defendant or the trial and sentencing witnesses who have offered testimony relevant to the sentencing decision.

The sentencing judge does not base his decision solely on information conveyed to him during the sentencing hearing and does not rely solely on evidence presented in written reports to the exclusion of live testimony. The testimony elicited during trial can reveal mitigating circumstances which the probation or presentence report completely misses, and the live testimony of a credible psychiatrist, relative or friend at the sentencing hearing can provide greater insight into the defendant's behavior than a cursory written outline of his social background. The point is that the sentence choice results from a dynamic process in which the trial judge plays the central role. To switch that role to a tribunal that has not participated in the process works a substantial unfairness on the defendant.

In the first place, evidence relevant to the sentence is developed and presented with an eye to the individual attitudes and practices of a particular judge. The judge's attitudes encompass both his reactions to the defendant's case in particular, reflected throughout the trial, and his more generalized history of sentencing practices. A competent defense lawyer will be attuned to these attitudes and will gear the presentation of evidence at sentencing, and

even during trial, to those attitudes. As a result, the content of the sentencing presentation will depend on the tribunal charged with the responsibility for sentencing.

Appellate review of sentences at the government's instigation would replace the trial judge with a remote and unknown group of appellate judges as the final arbiters of the defendant's punishment. It would make it extremely dangerous to devise and rely upon a strategy directed specifically at the trial judge. The result is to deprive the defendant of the trial judge's familiarity and proximity to the case and to deny him the benefit of having the sentence finally resolved in the particular tribunal that has heard all the evidence.

The interjection of the appellate tribunal into sentencing also deprives the defendant of the trial court's subjective evaluation of the defendant's character and attitude. This Court has recognized that "For the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (*Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937), quoted with approval in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).) The trial judge's evaluation of character can be greatly influenced by seeing and hearing the defendant during the course of the courtroom proceedings. These observations can provide insights into such matters as the defendant's veracity (see *United States v. Grayson*, 438 U.S. 41 (1978), his willingness to accept responsibility for his conduct, the genuiness of any display of remorse, his attitude toward authority (see *Roberts v. United States*, . . . U.S. . . . (1980)) and toward the processes of the law, etc. An appellate tribunal would not have the personal contact necessary for such an evaluation and it will not be available from the cold pages of the transcripts.

The situation of being forced to rely on a cold transcript before a second tribunal also raises a due process problem deserving some mention. As the dissenters in *Swisher v. Brady* recognized (*Swisher v. Brady, supra*, 438 U.S. at 229-233 (Marshall, J., dissenting)), due process encompasses the principle that hearing and observing live witnesses are important to a reliable factfinding process. Sentencing hearings often include witnesses brought in to contest or supplement written probation and presentence reports, and the judge's evaluation of the credibility of those witnesses will influence the sentence choice. An appeal from the sentence decision will obviously be based solely on the cold record provided by the transcript. As a result, the appellate tribunal will be unable to observe and evaluate the demeanor of favorable witnesses.

The dissent in *Swisher* correctly observed that this artificial limitation on the evidence before the reviewing court denies the defendant due process of law; but the due process violation in the sentencing context is even more prejudicial than in the *Swisher* context. The procedures under scrutiny in *Swisher* at least allowed the accused juvenile to elect a hearing *de novo* before a trial judge when the state filed exceptions to the findings of the master. Where the juvenile deemed it important, demeanor evidence might still play a part in the resolution of the case. On the other hand, the appellate forum which would handle sentence appeals would not take evidence under any circumstances and is unprepared and unequipped to do so. The significance of demeanor evidence relevant to the sentencing decision would be lost on the appellate court and the defendant would be totally foreclosed from presenting it in that forum.

The obvious point here is that sentencing by an appellate tribunal is qualitatively different from sentencing by the trial court. It is significant that all the cases used by the Solicitor

General in his brief to show that courts sometimes have power to resentence a defendant more harshly, involve resentencing by the trial court. (See *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bozza v. United States*, 330 U.S. 160 (1947); *Commonwealth v. Weymouth*, 84 Mass. 144 (1861).) The Government can cite no case which approved harsher resentencing by any appellate tribunal. This fact adds to the "impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court," evidence which convinced the Second Circuit to dismiss the Government's appeal in Mr. DiFrancesco's case. (604 F.2d at 785.)

B. Government Appeals of Sentences Do Not Provide the Only Means or Even the Most Effective Means for Promoting Greater Uniformity in Sentencing.

In the Brief for the United States, the Solicitor General argues that government appeals of sentences should be allowed because they would promote greater uniformity in sentencing and result in a fairer sentencing structure. It is, of course, one thing to say that disparity in sentencing from one judge to another or from one jurisdiction to another is a problem deserving of attention. It is quite another to conclude that the solution lies in appellate review of sentencing or that appellate review should include authorization for the appellate tribunal to increase the sentence imposed by the trial judge. The goal of uniformity can be promoted by methods other than appellate review, and can also be promoted by appellate review which does not include the power to increase the sentence.

Judge Frankel discusses some of the alternatives for promoting uniformity in Criminal Sentences: Law Without Order (1973). Sentencing institutes come in for heavy crit-

icism as too brief, too infrequent and too poorly organized to do much good (pp. 61-66), but some impact on gross disparity and some limited movement toward consensus can surely be anticipated from more intense, more frequent and better organized exchanges among sentencing judges. Another alternative, the sentencing council, involves a process where several judges from the same district confer and share their views on a particular case after reviewing the presentence report. Judge Frankel finds the results encouraging where this process has been used experimentally because the tendency is to level out individual extremes toward leniency and toward severity and to approach a middle ground (pp. 69-74).

Judge Frankel also lists and argues the case for appellate review of sentences as a means to eliminate gross disparities (pp. 75-85). However, he does not address the double jeopardy implications of government appeals in which a harsher sentence is sought. Moreover, his concern that sentences be subject to appellate review is directed toward providing an escape value for the "cruelly excessive" sentence (pp. 81-82, 84) through the development of uniform sentencing principles.

It is revealing that Judge Frankel cites with approval the English practice of allowing a separate appeal against sentence. England allows only the offender to initiate an appeal against the sentence and does not permit the prosecution the same right. (Thomas, David A., *Principles of Sentencing*, pp. 4-5 (1979).) While the Solicitor General would attack this system as unbalanced, it nevertheless is a viable system for promoting uniformity once it is recognized that an appellate ruling upholding a sentence challenged as excessive by the defendant does not stand for the proposition that the sentence was appropriately severe. It only says it was not excessive. Where an English appellate court upholds dis-

similar sentences in similar cases, the most severe sentence it upholds logically provides guidance as to what is proper. In this way, over time, the appellate court can lead trial courts toward uniformly appropriate terms.

Another alternative to appellate review, one that Judge Frankel does not discuss, was adopted in California as part of the 1977 revision of California's sentencing structure (discussed in greater detail, *infra*). The California Legislature clearly stated that uniformity of sentences for similarly situated offenders was the central goal of the new system. (Cal. Pen. Code §1170(a)(1).) To help achieve this goal, the Legislature included an administrative process for identification of disparate sentences. It charged the parole authority (now known as the Board of Prison Terms) with the responsibility of reviewing the sentences of all felons receiving determinate prison terms. The review must include a comparison of each individual sentence with sentences of others convicted of similar crimes. If the sentence is deemed disparate, the Board must recommend that the trial court recall the sentence and resentence the offender. (Cal. Pen. Code §1170(f).) The resentencing is discretionary with the trial judge and subject to the limitation that the new sentence may not be greater than the initial sentence. (Cal. Pen. Code §1170(d).)

Where the Board determines that a sentence is disparately lenient, the recommendation for resentencing serves the goal of promoting uniformity even though the resentence cannot result in a harsher punishment. In this circumstance, the Board's recommendation is essentially advisory. But the trial judge is alerted to the disparity and can make adjustments in his future sentencing practices in response to this information. One virtue of California's administrative disparate review is that it is performed by one centralized agency with access to data on every felon sentenced to state

prison. Appellate review, on the other hand, would be limited to cases from the geographical jurisdiction of the appellate tribunal and would only include those cases in which an appeal is filed. Thus, appellate review would not necessarily address disparities between different jurisdictions or court systems, disparities which may be more significant than those between judges in the same districts. (Silberman, Charles E., *Criminal Violence, Criminal Justice*, pp. 254-255 (1978).) In addition, appellate review would exclude large numbers of cases where neither side appealed, or where they appealed but did not challenge the sentence.

Appellate review of sentences is only one possible route to greater uniformity in sentencing. Even if one assumes it is the best alternative available, it does not follow that appellate review can only be effective in eliminating disparity if the government has the right to instigate appeals of those sentences the prosecution deems too lenient. England, for example, has managed to develop an effective system without a government right to appeal the sentence. (Thomas, *Principles of Sentencing* (1979).) In any event, whatever the benefits that might accrue for the administration of justice through appellate review of sentences at the instigation of the state, they do not justify sacrificing the principles underlying the Double Jeopardy Clause.

C. Government Appeals of Sentences Will Eliminate the Certainty in California's Determinate Sentences and Holds the Potential for Dramatically Increasing California's Appellate Workload.

1. A Summary of the California Determinate Sentencing System.

Effective July 1, 1977, the State of California enacted a "determinate" sentencing system to replace the "indeterminate" system it had utilized for 60 years. The determinate scheme applies to all but the most serious felony

offenses and limits the maximum period of prison incarceration much more sharply than did the indeterminate sentencing law. In place of terms with ranges such as six months to life or three years to life, the new law substitutes terms with ranges such as two, three or four years or two, four or six years. The new law also removes the power for setting the actual period of incarceration from the parole board and places it in the hands of the trial judge. The parole board, known as the Board of Prison Terms, still exists to supervise felons released on parole after serving their fixed terms and to conduct parole consideration hearings for felons convicted of crimes to which an indeterminate sentence still attaches, such as first and second degree murder (with terms of 25 years to life and 15 years to life respectively) and kidnapping for robbery (with a term of straight "life"). (See Cal. Pen. Code §§190, 209, 3041.) However, from the perspective of most convicted felons (all except those sentenced to indeterminate terms for the most serious felonies), the major change accomplished by the new law is that they know how long they will remain incarcerated when they enter prison. They no longer face the uncertainty and vagaries of a discretionary parole system.

It is necessary to describe the determinate sentence system in some detail in order to explain the impact on that system of a generalized government right to appeal sentencing decisions. A determinate sentence starts with a "base term" for the offense for which the defendant faces imprisonment. (See Cal. Rules of Court, rule 405(b).) The base term is selected from among the three possible terms prescribed by statute for virtually all felony offenses. For example, robbery carries a punishment of two, three or five years in prison. (Cal. Pen. Code §213.) The sentencing court must select the middle term punishment unless there are "circumstances in aggravation of mitigation of the crime" jus-

tifying imposition of the upper term or the lower term. (Cal. Pen. Code §1170(b).) The upper term may not be imposed unless circumstances in aggravation are established by a preponderance of the evidence and the sentencing judge determines that aggravating circumstances outweigh mitigating circumstances. Selection of the lower term can only follow a similar preponderance finding and a finding that mitigation outweighs aggravation. (Cal. Rules of Court, rule 439(b).)

For the guidance of trial courts, the California Judicial Council has adopted rules defining circumstances in aggravation and mitigation. (Cal. Pen. Code §1170.3; Cal. Rules of Court, rules 421 & 423.) They include an open ended list of suggested factors relating to such matters as the actual or potential harm to the crime victim (''great violence'' versus ''caution to avoid harm''), the defendant's degree of involvement (leadership versus minor role), the degree of criminal sophistication, the presence of provocation on the part of the victim or other circumstances tending to demonstrate diminished culpability falling short of a legal excuse for the defendant's conduct, and the defendant's mental state and criminal background.

The base term is only the first step in sentencing. The California Legislature deemed certain typical aggravating circumstances surrounding crime sufficiently serious to merit increased punishment on their own rather than simply as reasons for selecting the upper term. Therefore a number of penalty provisions were drafted to add incremental periods of punishment to the base term, known as ''enhancements'', premised on factual findings that the defendant personally used or was armed with a deadly weapon, intentionally inflicted great bodily injury on the victim, caused a property loss of great value, or served time in prison because of prior felony convictions.

More specifically, a defendant faces a two year enhancement to the base term punishment if he personally uses a firearm during the commission of the crime—three years if the crime is one of six enumerated forcible sex crimes. (Cal. Pen. Code §§12022.3(a), 12022.5.) The enhancement for personal use of a deadly or dangerous weapon other than a firearm is generally one year, or three years in the case of enumerated sex crimes. (Cal. Pen. Code §§12022(b), 12022.3(a).) Mere arming with a firearm, as opposed to actual use, can generally add one year to the base term, but adds two years if the crime is an enumerated sex offense. (Cal. Pen. Code §§12022(a), 12022.3(b).) Arming with a deadly weapon other than a firearm cannot result in a specific enhancement for most crimes, but can add two years if the crime is an enumerated sex offense. (Cal. Pen. Code §12022.3(b).)

The other enhancement provisions carry similar increments of punishment. Great bodily injury to the victim may result in a three year enhancement for most crimes, or a five year enhancement for forcible sex crimes. (Cal. Pen. Code §§12022.7, 12022.8.) A felon who takes, damages or destroys property causing a loss in excess of $25,000 faces a one year enhancement, but if the loss exceeds $100,000 the enhancement increases to two years. (Cal. Pen. Code §12022.6.) Although enhancements for a defendant's prior record have become more complex due to recent legislation increasing punishment for forcible sex offenses, in general every "prior separate prison term" (a concept carefully distinguished from a simple prior conviction) can add at least one year to the base term. (Cal. Pen. Code §667.5(b).) If a present offense is a "violent felony" and the prior prison term was imposed for a "violent felony," then the enhancement for each such prior prison term is three years. (Cal. Pen. Code §§667.5(a), (b).) Sentencing for forcible

sex offenses follows these rules for priors unless the priors are also for forcible sex offenses. In that case each prior *conviction* (whether or not a prison term resulted) can add a five year enhancement (Cal. Pen. Code §667.6(a)), and if the defendant has served two or more prior prison terms for forcible sex offenses, each separate prior term can add 10 years to his sentence. (Cal. Pen. Code §667.6(b).)

All the specific enhancement provisions depend on factual findings left to the jury unless the defendant admits the factual premise. However, an adverse factual finding or an admission of an enhancement does not bind the sentencing judge completely. The judge still has the power to strike the additional punishment called for by the enhancement provisions if he determines there are circumstances in mitigation which justify this action. (Cal. Pen. Code §1170.1(g).) The same sort of mitigating factors that might support the selection of the lower term punishment may also support striking the punishment for an enhancement. (Cal. Rules of Court, rule 423.)

In addition to the base term and specific enhancements, the determinate sentencing structure also provides for increases in the prison term where the defendant has suffered multiple convictions and the judge elects to sentence him consecutively. It is not just a matter of adding together the base terms and the enhancements for each crime. While the judge has the discretion to elect this harsher "full term" approach where the multiple convictions are for enumerated forcible sex offenses (Cal. Pen. Code §667.6(c)), normally the judge may only add to the base sentence one-third of the middle term for each consecutive offense plus one-third of any weapon or great bodily injury enhancement when the consecutive offense meets the definition of a "violent felony." (Cal. Pen. Code §1170.1(a); see also §667.5(c).) The judge's discretion to sentence consecutively on multiple

counts includes the power to run a determinate sentence consecutively to an indeterminate sentence. (Cal. Pen. Code §669.) The determinate term must be completed before the defendant begins to serve the indeterminate term. In practical terms, this means a defendant with a 10 year determinate term for several robberies and a consecutive 25 to life term for a first degree murder must serve the 10 years (minus credits of up to one-third for good behavior) before he can even start serving the set minimum of 16 years and 8 months necessary for him to become eligible for parole on the murder sentence. (See Cal. Pen. Code §190.) The judge may also order two indeterminate terms to run consecutively. (Cal. Pen. Code §669.)

2. The Impact in California of a Government Right to Appeal Sentences.

This abbreviated course in California's determinate sentencing structure should demonstrate that California judges have a number of judgment calls and discretionary decisions to make at sentencing when they impose a prison term. The determinate sentence system was designed to make these decisions final so that the felon will know the precise term he faces when he enters prison. Secure in this knowledge, he does not have to agonize over how to satisfy a parole board. The relatively sound theory behind this is that the increased certainty will facilitate a better adjustment to incarceration. A government appeal of the sentence, however, would obviously remove the benefits of certainty and change a final sentence into a tentative sentence pending appeal. Until the appellate process runs its course a year or more down the line, the maximum punishment continues to hang over the offender's head. The Double Jeopardy Clause was designed to prevent the exact type of anxiety and ordeal that a government appeal of sentence creates by forcing the

offender to defend against the maximum punishment for a second time on appeal.

It is, of course, true that the range of punishment under California's determinate sentencing law may be narrower in general than the range of punishment faced by Mr. DiFrancesco in the federal system. As a special offender, DiFrancesco faces the theoretical possibility of having his concurrent 10 year sentences increased by the appellate court to sentences of 25 years. This 15 year differential would be unlikely under present California law. However, the narrower ranges under California law should not be relied upon to minimize the uncertainty caused by appellate review of sentencing at the instigation of the prosecution. In the short period from July 1977 to the present, the California Legislature has twice passed major revisions of the determinate sentencing structure with the purpose of increasing punishment and widening the available range of sentences, especially for violent crimes. A few examples of these changes will illustrate the trend.

The original determinate sentencing law provided for no more than a one year differential between the lower and middle terms or between the middle and upper terms for any given offense. The recent amendments to the law provide for one, two and three year differentials between the lower and middle terms for some offenses (see *e.g.*, Cal. Pen. Code §§213, 220 and 264) and one or two years between the middle and upper terms (see *e.g.*, Cal. Pen. Code §§245(a) & 461). Recent legislation also increases the weapon, great bodily injury and prior record enhancements applicable to enumerated forcible sex offenses as well as increasing the term for consecutive sentences on these offenses. Finally, whereas the original determinate sentencing law provided only for concurrent terms where a felon was convicted of a combination of determinate and indetermi-

nately sentenced crimes, recent changes make it possible to run such sentences consecutively.

From these examples, the trend to increase determinate penalties is readily apparent. Public pressure in that direction is clearly difficult to resist, and California's narrow determinate ranges have started to be displaced by much broader ranges. The potential impact on a California sentence of a government appeal is fast approaching the dramatic impact which Mr. DiFrancesco faces.

In addition to eliminating the certainty in determinate sentences, the creation of a government right to appeal the trial court's sentence could also dramatically increase California's appellate workload. Obviously, any one of the decisions made by a judge at sentencing may dissatisfy the prosecution if it results in a term shorter than the maximum. Potentially, authorization of government appeals could trigger an appeal every time a judge imposes the middle or lower term, strikes the punishment for an enhancement, utilizes the more lenient formula for consecutive sentencing involving multiple sex offenses or elects to sentence the defendant concurrently on multiple counts.

In California, this impact on the appellate caseload would perhaps be more significant than in other jurisdictions because government appeals of determinate sentences would not be limited to sentences following contested trials. Such appeals could also be taken from sentences following plea bargains. Bargaining under determinate sentencing generally takes the form of charge bargaining, where the remaining charges then define a legal maximum for the term; or the bargain involves a commitment that a sentence will not exceed a maximum number of years which is something less than the legal maximum for the charges involved. In either case, the sentencing judge usually retains some discretion to sentence below the maximum, for example by

imposing the middle term rather than the upper term. With a government right to appeal the sentence, the exercise of this remaining discretion would be subject to appellate review if the prosecution was dissatisfied with less than the maximum. Unless the defendant bargained for a precise number of years, no more and no less, he could not avoid the uncertainty, and the state could not avoid the cost, that appellate review would interject.

The determinate sentencing law increased the number of decisions a California judge must make in sentencing a felon to prison. A government right to appeal the judge's sentence choices will open the way for appellate consideration of every lower term and every concurrent sentence, even where the sentence follows a bargained disposition. The major fallout will be to create uncertainty as to the final term of imprisonment for every felon sentenced to state prison, and to further clog California's appellate forums.

Conclusion.

The Double Jeopardy Clause protects citizens from the ordeal and expense of twice defending themselves against the same charges. It also protects the defendant's right to have his trial completed in a particular tribunal. Authorization of government appeals of sentence would force the accused to defend himself against the maximum sentence for a second time on appeal having already done so at the trial level. It would remove the final decision on sentence from the trial judge, with his proximity and familiarity with the case, and place it in the hands of a remote and unknown appellate tribunal. These results would thwart the principles underlying the Double Jeopardy Clause and thereby violate its mandate.

For these reasons, and the other reasons stated in the brief, the judgment of the United States Court of Appeals

for the Second Circuit should be affirmed in its dismissal of the government's appeal of the sentence.

Respectfully submitted,

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